Supreme Court, U.S.
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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Utah Supreme Court's decision on remand directly contravened this Court's mandate in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and fundamental due process principles, by imposing a punitive damages award vastly in excess of the amount this Court deemed constitutionally permissible, by contradicting and rejecting specific holdings and findings of this Court in its application of the constitutional punitive damages guideposts, and by relying on the defendant's perceived lack of remorse in its defense and appeal of this case as a basis for punitive damages?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company is a mutual insurance company. It has no parent company.

Respondent Inez Preece Campbell is an individual. Respondent Matthew C. Barneck is the special administrator and personal representative of the Estate of Curtis B. Campbell.

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Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court entered on remand from this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

OPINION BELOW

The opinion of the Utah Supreme Court (A.1), which is available at 2004 WL 869188, is not yet officially reported.

STATEMENT OF JURISDICTION

The judgment of the Utah Supreme Court was entered on April 23, 2004. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), this Court vacated a $145 million punitive damages award and remanded the case to the Utah Supreme Court for proceedings not inconsistent with this Court's opinion. Despite this Court's admonition that the outermost due process limit for a punitive damages award under the facts of this case specifically would be "at or near the amount of compensatory damages" of $1 million, *id.* at 429, the Utah Supreme Court has now imposed a $9 million punitive damages award. The Utah Supreme Court's decision is contrary to the due process principles limiting punitive damages awards articulated by this Court in this very case and to this Court's application of those principles to State Farm's alleged conduct toward the Campbells.

Mr. Campbell's Case. This case began with State Farm's handling of claims asserted by third parties against a State Farm insured, Curtis Campbell, after a 1981 automobile accident. State Farm declined an offer to settle the claims

against Mr. Campbell for the policy limits ($50,000) and proceeded to trial. Mr. Campbell was found 100% at fault, and judgment was entered against him in the amount of $136,000 over his policy limits. The excess judgment against Mr. Campbell was the only instance in Utah where a State Farm insured was exposed to the possibility of execution on an excess judgment after a refusal by State Farm to settle within policy limits.

After the excess judgment against Mr. Campbell was affirmed on appeal, Mr. Campbell and his wife, represented by the attorneys for the third-party plaintiffs who had sued him, sued State Farm alleging bad faith failure to settle, intentional infliction of emotional distress, and fraud, and asserting a claim for punitive damages. The jury found against State Farm and awarded $1.4 million and $1.2 million emotional distress damages to Mr. and Mrs. Campbell, respectively, $911.25 for the Campbells' out-of-pocket legal expenses, and $145 million in punitive damages. The trial court remitted the emotional distress damages to $1 million in total and remitted the $145 million punitive award to $25 million. On appeal, the Utah Supreme Court reinstated the $145 million punitive award.

This Court's Decision. This Court granted certiorari and reversed the $145 million punitive award as excessive as a matter of due process under the three guideposts established by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for evaluating the constitutionality of punitive damages awards. In its opinion, this Court held that punitive damages may not be imposed to punish conduct that was dissimilar to and bore no relation to the conduct directed against the plaintiffs, but must be "based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425. The Court also gave guidance as to how the three *Gore* guideposts should be applied and analyzed those guideposts with specific reference to the facts and circumstances in this case.

With regard to reprehensibility, this Court observed that State Farm's conduct toward the Campbells "merits no praise." *Id.* at 419. Nonetheless, this Court characterized the harm in the case as "ar[ising] from a transaction in the economic realm, not from some physical assault or trauma," and

noted that "there were no physical injuries." *Id.* at 426. This Court also recognized that "State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Id.* Moreover, the Court found that the punitive award could "not be justified on the grounds that State Farm was a recidivist" because the Campbells had "shown no conduct by State Farm similar to that which harmed them." *Id.* at 423-24. In assessing State Farm's reprehensibility, this Court had before it not only the parties' briefs, which discussed the reprehensibility guidepost and the conduct at issue at length, but also the opinions of the Utah Supreme Court and the Utah trial court, and a voluminous joint appendix ("JA") of the record in this case.

With regard to ratio, this Court made clear that while few punitive awards in a ratio of more than single digits to compensatory damages would pass constitutional muster, in many cases, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. The Court also stressed that emotional distress damages, such as those awarded to the Campbells, are likely to contain a punitive element and therefore support a smaller ratio. *Id.* at 426. Addressing the third guidepost, civil penalties authorized or imposed in comparable cases, this Court opined that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud." *Id.* at 428.

Pursuant to its application of the three *Gore* guideposts to this case, this Court concluded that, because the compensatory damages awarded to the Campbells were substantial and contained a punitive element, a punitive award in an amount "at or near the amount of compensatory damages" (*i.e.*, $1 million) likely would be the constitutionally permissible maximum. *Id.* at 429. Noting that the "proper calculation of punitive damages under the principles [the Court] ha[d] discussed should be resolved, in the first instance, by the Utah courts," this Court reversed the judgment and remanded the case "for proceedings not inconsistent with this opinion." *Id.*

The Proceedings Before the Utah Supreme Court on Remand. On remand, the parties briefed and argued before the Utah Supreme Court the meaning and scope of this Court's mandate and the proper calculation of punitive damages in light of this Court's decision. State Farm argued that, in accordance with this Court's opinion, the punitive award should be set in an amount at or near the compensatory damages of $1 million. *See, e.g.*, State Farm's Motion for Judgment Regarding Punitive Damages at 2-4; State Farm's Memorandum in Opposition to Plaintiffs/Appellees' Cross-Motion for Determination of Punitive Damages at 2, 26. Plaintiffs disagreed, urging that this Court's overall conclusion regarding the constitutionally appropriate amount of punitive damages in this case was "little more than the expression of a judicial hunch," "not having even the status of dictum" and "obviously . . . not binding" on the Utah Supreme Court. Memorandum of Plaintiffs/Appellees/Cross-Appellants in Opposition to State Farm's Motion for Judgment Regarding Punitive Damages at 2, 3.

In its opinion following remand, the Utah Supreme Court, apparently agreeing with plaintiffs, dismissed as a mere "prediction" this Court's determination that proper application of the *Gore* guideposts in this case "likely would justify a punitive damages award at or near the amount of compensatory damages," *i.e.*, $1 million. A.5. Instead, the Utah Supreme Court imposed a punitive damages award of $9,018,780.75, based on its reanalysis of the *Gore* guideposts in light of "Utah's values and traditions." A.7. In assessing State Farm's reprehensibility, the Utah Supreme Court classified the Campbells' emotional distress as "akin to physical assault" and characterized State Farm's conduct as showing "indifference or reckless disregard for the health and safety of the Campbells." A.10,12. Although acknowledging this Court's finding that State Farm was not a recidivist, the Utah Supreme Court opined that the "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury." A.13. The Utah Supreme Court also stressed State Farm's "protestations of blamelessness" and "obdurate insistence" in appealing this case, State Farm's purported "feelings of pride and victimization," and its "defiance" and lack of remorse. A.13; *see also* A.12 ("State Farm has not voiced so much as a whisper of apology

or remorse;" State Farm "refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case").

In reanalyzing the ratio guidepost, the Utah Supreme Court asserted that it found "ample grounds" to justify a punitive damages award of $9 million, with a ratio of 9 to 1 to compensatory damages. A.13. The Utah Supreme Court rejected this Court's characterization of the compensatory emotional distress damages awarded in this case as containing a punitive element and thus warranting a lower ratio. The Utah Supreme Court concluded instead that the $1 million emotional distress damages in this case were purely compensatory and corresponded objectively to the actual "degree of emotional harm inflicted on the Campbells." A.15.

Finally, the Utah Supreme Court acknowledged that in this case the civil penalty for comparable conduct would be, as this Court stated, a $10,000 fine. A.17 & n.8. The Utah Supreme Court held, however, that the $9 million punitive award it imposed on State Farm did not "dwarf" the comparable $10,000 fine and thus was "in line" with this guidepost. A.17.

REASONS FOR GRANTING THE WRIT

The Utah Supreme Court's decision to award $9 million in punitive damages against State Farm contradicts this Court's opinion in this case and is inconsistent with the fundamental due process principles that limit punitive damages awards. The Utah Supreme Court characterized this Court's overall conclusion that application of the *Gore* guideposts in this case "likely would justify a punitive damages award at or near the amount of compensatory damages" as a mere "prediction." A.5. Thus, the Utah Supreme Court believed it could re-examine and reject numerous specific aspects of this Court's opinion, as incorrect and inapplicable in light of "Utah's values and traditions." A.7.

It is well settled that on remand for further proceedings from this Court, the lower court must proceed in accordance with this Court's mandate. *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948). The lower court must implement both the letter and spirit of the mandate, and "cannot vary it, or examine it for any other purpose than execution; or give any other

or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Where, as in this case, this Court's mandate requires the lower court to proceed in a manner not inconsistent with the opinion of the this Court, the "effect is to 'make the opinion a part of the mandate.'" *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 180 F.3d 542, 546 (3d Cir. 1999) (citation omitted).

This Court remanded this case for "proper calculation of punitive damages under the principles [the Court] ha[d] discussed." *Campbell*, 538 U.S. at 429. State Farm respectfully submits that this Court's remand for "proper calculation" of punitive damages was not an invitation to the Utah Supreme Court to impose a punitive damages award vastly in excess of what this Court reasoned would be the constitutionally permissible maximum. Rather, this Court's remand permitted the Utah Supreme Court to set an amount of punitive damages in light of and consistent with this Court's discussion. The Utah Supreme Court's new analysis of the application of the three *Gore* guideposts in this case, its repudiation of specific findings by this Court, and its resurrection of arguments and points rejected by this Court do not fall within the narrow zone of discretion granted to the Utah Supreme Court under this Court's opinion.

In its analysis, the Utah Supreme Court misapplied and distorted the three *Gore* guideposts. Its analysis of reprehensibility ignored or discounted the objective factors specifically identified by this Court as mitigating the reprehensibility of State Farm's conduct toward the Campbells. Contradicting this Court's specific findings that the harm to the Campbells "arose from a transaction in the economic realm, not from some physical assault or trauma" and that "there were no physical injuries" (538 U.S. at 426) the Utah Supreme Court reclassified the harm as "akin to physical assault." A.9,10. The Utah Supreme Court also discounted this Court's specific finding that State Farm was not a recidivist. Instead, the Utah Supreme Court invoked State Farm's purported failure to show remorse as a basis for speculating that "vigorous deterrence" (A.13) was needed – despite the plaintiffs' inability (expressly noted by this Court) to

point to any evidence that State Farm had engaged in any conduct in Utah similar to its conduct toward the Campbells. Moreover, the Utah Supreme Court's opinion makes clear that the purported lack of remorse it invokes to support its imposition of a $9 million punitive damages award is the lack of remorse supposedly evinced by State Farm during the litigation of this case and in its arguments on appeal. That purported lack of remorse (occurring more than a decade after the conduct toward the Campbells) was not part of and bore no similarity to the only conduct that this Court held would be relevant to punitive damages, namely, the alleged bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. The Utah Supreme Court's punishment of State Farm's purported lack of remorse not only contravenes this Court's prohibition on the use of punitive damages to punish dissimilar conduct, but unconstitutionally burdens a defendant's right to defend itself in civil litigation.

The Utah Supreme Court also found that it was not bound by the ratio analysis that this Court specifically applied to the circumstances of this case. Thus, while this Court stated that a ratio of approximately 1 to 1 was appropriate on the facts of this case, the Utah Supreme Court found "ample" support for a ratio nine times greater, and found as well that the punitive element that this Court discerned in the emotional distress damages in this case did not in fact exist. The Utah Supreme Court did follow this Court's guidance in looking to a $10,000 civil fine as the touchstone for the civil penalties guidepost, but improperly concluded that this $10,000 civil penalty supported not a $1 million punitive award, but a $9 million award.

The Utah Supreme Court rationalized its divergence from this Court's opinion, particularly with respect to the reprehensibility guidepost, by invoking "Utah's values and traditions." A.7. No state's "values and traditions" override due process limitations on excessive and arbitrary punitive damages. The Utah Supreme Court's reliance on state "values and traditions" would improperly transform the federal constitutional due process standard for punitive damages into an uncertain analysis yielding different and unpredictable answers in every state, depriving defendants, particularly

non-resident businesses and corporations, of the constitutionally required notice that particular conduct is punishable and of the severity of the punishment that may be incurred. Permitting the grossly excessive punitive damages award now imposed by the Utah Supreme Court against State Farm to stand will turn back the clock on this Court's constitutional punitive damages jurisprudence and allow state courts to impose large and arbitrary punitive awards – in violation of due process constraints – whenever they invoke amorphous and ill-defined state "values and traditions."

For these reasons and those set forth below, this Court should grant State Farm's petition for a writ of certiorari. State Farm submits that, because the Utah Supreme Court's decision is palpably inconsistent with this Court's mandate and with fundamental constitutional principles, this Court should summarily reverse the Utah Supreme Court's decision pursuant to Supreme Court Rule 16 and instruct the Utah Supreme Court to enter a punitive damages award in an amount "at or near the amount of compensatory damages," *i.e.*, no more than $1 million. *See Campbell*, 538 U.S. at 429. In the alternative, this Court should permit full briefing and oral argument and afford plenary consideration to the important constitutional issues raised by the Utah Supreme Court's decision.

I. The Utah Supreme Court's Analysis of Reprehensibility Is Inconsistent with This Court's Opinion and Contrary to the Constitutional Principles Governing Punitive Damages

To justify imposition of a $9 million punitive award against State Farm, the Utah Supreme Court improperly rejected this Court's analysis of the reprehensibility guidepost as applied to the facts of this case. The Utah Supreme Court's distorted and erroneous analysis of reprehensibility contradicts this Court's express conclusions and findings and contravenes the broad standards enunciated by this Court in its constitutional punitive damages jurisprudence.

A. The Utah Supreme Court's Analysis Distorts and Misapplies the Five Reprehensibility Factors

This Court has identified five factors that courts must consider in determining the reprehensibility of a defendant's

conduct: "whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77).

In its decision on remand, the Utah Supreme Court rejected this Court's application of the five reprehensibility factors to the record in this case. In substituting its own analysis for that of this Court, the Utah Supreme Court misapplied and distorted each of the factors, producing a result that is directly contrary to this Court's opinion and dismantling the effectiveness of this Court's reprehensibility analysis as a rational, objective framework for evaluating the reprehensibility of a defendant's conduct.

1. Whether the harm was economic or physical

In its opinion in this case, this Court specifically found that "there were no physical injuries" and that the "harm arose from a transaction in the economic realm, not from some physical assault or trauma."[1] *Campbell*, 538 U.S. at 426. The Utah Supreme Court, although purporting to be "mindful" of these findings, reclassified the harm in this case as "akin to physical assault." A.9, 10. The Utah Supreme Court's recharacterization of the harm as akin to physical assault directly contradicts this Court's analysis and does not provide a permissible basis for the punitive damages award now imposed by the Utah Supreme Court.

The Utah Supreme Court's equation of State Farm's decision not to settle claims against its insured to "physical assault" would improperly allow a finding of extreme reprehensibility and hence high punitive damages in any case in which a breach of an insurance contract or failure to perform under an insurance contract causes emotional distress

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[1] In addition, as this Court observed, "State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Campbell*, 538 U.S. at 426.

damages. Such a result is contrary to this Court's opinion, which made clear that there was no physical assault or injury in this case and that emotional distress damages both generally *and in this case* contain a punitive element and thus support a lower ratio. *See* Point II *infra*.[2]

Moreover, the Utah Supreme Court's characterization of the Campbells' harm as "akin to physical assault" ignores the fact that, as the trial court found, the record was devoid of "objective evidence of emotional or mental distress."[3] JA 3364. To fill this evidentiary and analytic void, the Utah Supreme Court focused its lengthy analysis of whether the harm in this case was economic or physical on such matters as the purported statement by the lawyer retained by State Farm to represent Mr. Campbell that the Campbells should put a "for sale" sign on their house, the "unnecessar[y] subject[ion of] the Campbells to the risks and rigors of a trial," the failure to "voice[] so much as a whisper of apology or remorse," and so forth. A.11, 12. These matters are largely irrelevant to the classification of the Campbells' harm, and the Utah Supreme Court's discussion of them serves only to circumvent the purpose of this factor, which is to incorporate into the reprehensibility analysis the long-standing recognition that tortious conduct that results in physical injury is particularly blameworthy.[4] Neither the record nor this Court's opinion

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[2] To bolster its reprehensibility analysis, the Utah Supreme Court also noted that some insureds purchase insurance to provide peace of mind. A.10. Under this analysis, every wrongful denial of an insurance claim becomes "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." A.10-11. The purpose of the punitive damages analysis is not to contrive a one-size-fits-all justification of high punitive damages against insurance companies, but to weigh the facts of each case in a balanced and fair manner, as this Court did in its opinion in this case.

[3] As the trial court additionally noted, "[t]here was a relatively limited period of time in which the primary stressor, i.e., the threat of financial ruin, was a real threat to the Campbells." JA 3364.

[4] This Court's recognition of the heightened reprehensibility of tortious conduct involving physical injury or the threat of physical injury is based both on long-standing common law punitive damages principles and on analogous principles of criminal law. *See Gore*, 517 U.S. at 575-76 ("[W]e have said that 'nonviolent crimes are less serious than crimes

(continued...)

permitted the Utah Supreme Court to inflate its estimate of the reprehensibility of State Farm's conduct by classifying the Campbells' emotional distress in this case as "akin to physical assault."

2. Indifference or reckless disregard for the health and safety of others

The Utah Supreme Court's analysis of the second reprehensibility factor, whether State Farm showed "indifference or reckless disregard for the health and safety of others," is similarly skewed. The Utah Supreme Court, incorrectly, found that this factor was met because State Farm "evinc[ed] a reckless disregard for the Campbells' peace of mind." A.12. This factor, like the first factor, looks to *physical* injury or danger caused by a defendant's wrongful conduct as an indicator of heightened reprehensibility. *See, e.g., Bielicki v. Terminix Int'l Co.*, 225 F.3d 1159, 1165 (10th Cir. 2000) (applying *Gore* analysis; finding that indifference and reckless disregard for the health and safety of others was shown where the defendant's "atmosphere of condoning disregard of safety concerns resulted in permanent physical injuries to the plaintiffs"). An insurer's delay in paying an excess verdict is simply not the kind of conduct to which this factor applies.

3. Whether the target of the conduct had financial vulnerability

The Utah Supreme Court's reliance upon the third factor, whether the "target of the conduct had financial vulnerability," 538 U.S. at 419, is inconsistent with this Court's opinion and with the record in this case. Plaintiffs' arguments regarding the Campbells' purported vulnerability were fully briefed before this Court and urged by plaintiffs' counsel at oral argument. *See* Resp't Br. at 11-14; Pet'r Reply Br.

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[4](...continued)
marked by violence or the threat of violence'") (citing *Solem v. Helm*, 463 U.S. 277, 292-93 (1983), *Blanchard v. Morris*, 15 Ill. 35, 36 (1853) (upholding punitive damages for extortion accomplished through imprisoning and blindfolding victim and threatening to bleed him to death and hang him), and *Louisville & Nashville R.R. Co. v. Brown*, 106 S.W. 795, 799 (Ky. 1908) (reversing punitive damages award; stating: "We are not aware of any case in which the court has sustained a verdict as large as this one unless the [physical] injuries were permanent")).

at 6; *State Farm Mut. Auto. Ins. Co. v. Campbell*, Oral Argument Transcript, No. 01-1289, 2002 WL 31808900, at *28 (U.S. Dec. 11, 2002). This Court in its opinion did not address this factor in its application of the reprehensibility analysis to the facts of this case and hence implicitly rejected plaintiffs' arguments regarding the Campbells' purported vulnerability. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990) (this Court "implicitly rejected" arguments "by refusing to address them").[5] The Utah Supreme Court's reliance on this ground for differing from this Court's assessment of reprehensibility is therefore impermissible.

In any case, the record does not support the Utah Supreme Court's portrayal of the Campbells as unsophisticated and vulnerable. Mr. Campbell had a B.A. in mathematics and an M.A. in meteorology from Utah State University. JA 747-48. He had taught high school and worked for 15 years for Boeing in engineering management. At the time of the accident he was working as an electrical contractor and was 63 years old. JA 747-48, 792-93. At the time of the accident, Mrs. Campbell was 51 years old and was working as a teller and in the bookkeeping department at Lewiston State Bank. R. 10312: 1-3; 25-26. Moreover, there was no testimony of any kind that the Campbells were *targeted* by State Farm. Although Ray Summers, the State Farm adjuster who handled the claims against Mr. Campbell testified as a plaintiffs' witness, he never in his testimony stated or suggested that the Campbells were "targeted" because they were financially vulnerable.

The Utah Supreme Court based its assumption that the Campbells' "vulnerability enabled, if not motivated," State Farm's conduct on the supposed "post-judgment advice given to the Campbells by State Farm's attorney that they put a 'for sale' sign on their house." A.12. Wendell Bennett, the lawyer retained by State Farm to defend Mr. Campbell, categori-

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[5] In addition, Justice Ginsburg's dissent discusses the Campbells' purported vulnerability, demonstrating beyond contradiction that these arguments were brought to the attention of and rejected by the Court. *See* 538 U.S. at 434 (Ginsburg, J., dissenting).

cally denied giving such advice to the Campbells.[6] In any event, Mr. Bennett's purported advice to the Campbells to put a "for sale" sign on their house has no logical or probative connection to the Utah Supreme Court's conclusion that State Farm was "enabled" or "motivated" by the Campbells' purported vulnerability. In addition, Mr. Bennett testified without contradiction that, after the verdict against Mr. Campbell, he suggested to the Campbells that they "go see another attorney" (JA 360), and, in fact, Mr. Campbell did consult with another attorney a day or two after the verdict. JA 749. Mr. Bennett's advice to consult another attorney is clearly inconsistent with the Utah Supreme Court's conclusion that State Farm (or Mr. Bennett) was motivated by the belief that Mr. Campbell would not "protect himself" from State Farm's "predations." A. 12. More importantly, the alleged advice to put a "for sale" sign on their house was before this Court, recited in this Court's opinion, and part of the basis for this Court's conclusion that State Farm's conduct "merit[ed] no praise." *Campbell*, 538 U.S. at 419. Consistent with this Court's opinion, that alleged advice cannot now serve as support for the proposition that State Farm's conduct was so extraordinarily reprehensible as to warrant a punitive damages award far in excess of that authorized by this Court.

4. Repeated actions or an isolated incident

This Court has stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance" and that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Gore*, 517 U.S. at 576-77; *see also Campbell*, 538 U.S. at 423. Conversely, in the absence of a "history of noncompliance," a court cannot justify a large puni-

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[6] Wendell Bennett, the lawyer for the Campbells, testified that he "absolutely didn't" tell the Campbells to put a for sale sign on the house. JA 359. He testified that after the original trial "[i]t was either Mr. or Mrs. Campbell said, 'Should we put a sign for sale on our property?' And I said no . . . . I said that I was going to file post trial motions, and if that failed, if I wasn't able to get the relief at that level, I planned to file an appeal to the Supreme Court." JA 360.

tive award on the ground that it was necessary to deterrence without considering whether a "less drastic" penalty would adequately protect the state's citizens. *Gore,* 517 U.S. at 584-85. Thus, the recidivism factor is directly related to the need for deterrence.

In this case, this Court found that State Farm was *not* a "recidivist" because the Campbells had "shown no conduct by State Farm similar to that which harmed them." *Campbell*, 538 U.S. at 423-24. In its reprehensibility analysis, the Utah Supreme Court conceded that it was "bound by [this] Court's finding that State Farm was not a recidivist." A.13. Nonetheless, the Utah Supreme Court entirely subverted that finding, theorizing that the "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury, and that the citizens of Utah therefore have no reason to deter State Farm's future conduct." A.13. The Utah Supreme Court's reliance on the purported need to deter State Farm, despite the "absence of a history of noncompliance," *Gore*, 517 U.S. at 584, is contrary to this Court's constitutional punitive damages jurisprudence and to this Court's opinion in this case.

The record in this case, moreover, showed not only an absence of similar prior bad acts, but also an absence of similar subsequent bad acts by State Farm in the decade and a half between the Campbells' automobile accident and the bad faith/punitive damages phase of the trial of the Campbells' claims against State Farm. The record established that between 1980 and 1994, State Farm handled more than 29,000 third-party bodily injury claims against its insureds in Utah. Of these more than 29,000 claims, Mr. Campbell's case was the *only* instance where a State Farm insured was exposed to the possibility of execution on an excess verdict after a refusal by State Farm to settle within policy limits.[7] *See* JA

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[7] The unrebutted testimony of State Farm's regional vice president Buck Moskalski established that in the five excess verdict cases in Utah since 1989, State Farm had determined it should bear the responsibility for its decision to proceed to trial rather than accept a settlement offer within policy limits. In those cases, State Farm either paid the excess verdicts in full or settled with the third-party claimants so that the insureds paid

(continued...)

287-97, 1851-53, 3005. Thus, this Court concluded in its opinion that "the adverse effect [of State Farm's handling of the claims against Mr. Campbell] on the State's general population was in fact minor." *Campbell*, 538 U.S. at 427.

In view of the record, the constitutional principles set forth in *Gore* and *Campbell*, and this Court's conclusion that State Farm was not a recidivist, the need for deterrence hypothesized by the Utah Supreme Court is wholly imaginary. The Utah Supreme Court's subjective and speculative impression that State Farm might not have "forsworn" the conduct alleged in this case – despite the uncontradicted, objective evidence to the contrary – is inconsistent with this Court's opinion and does not support the excessive punitive award imposed on remand by the Utah Supreme Court.

5. Whether the harm was the result of intentional trickery or malice

The Utah Supreme Court based its conclusion that the harm sustained by the Campbells was the result of trickery or malice upon the purported "false story" that State Farm manager Bob Noxon allegedly instructed State Farm claims handler Ray Summers to "manufacture," namely, that Todd Ospital "was speeding because he was on his way to see a pregnant girlfriend." A.14. This purported fact was before this Court when it made its reprehensibility analysis in this case. *See* Pet'r Br. at 5; Resp't Br. at 13; *Campbell*, 538 U.S. at 432 (Ginsburg, J., dissenting). Therefore, even assuming

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[7](...continued)
nothing. JA 1851-52. Mr. Moskalski also testified as to his decision made during the trial to formalize State Farm's policy of paying excess verdicts by sending letters to insureds prior to trial, promising to pay any compensatory damages that a jury might award in excess of policy limits. JA 1854, 1890. State Farm submitted examples of such "peace of mind" letters sent to Utah policyholders in accordance with Mr. Moskalski's decision, both in support of its motion for JNOV, new trial or remittitur before the trial court (which refused to accept the letters) and in support of its petition for rehearing to the Utah Supreme Court. *See* Pet'r Lodging ("L") 594-98; 599-607. State Farm's policy of sending such letters is also reflected in the Utah Supreme Court's opinion in *Green v. Louder*, 29 P.3d 638, 642, 648-49 (Utah 2001), in which the court specifically referenced such a letter provided by State Farm when it decided to litigate the third-party claims asserted against its insureds in that case.

the truth of this allegation and assuming that the Campbells' harm was somehow caused by the purported "manufacture" of this story,[8] that circumstance does not support the Utah Supreme Court's racheting up the punitive award from an amount "at or near the amount of compensatory damages" – as this Court concluded might be constitutionally justifiable – to an amount nine times in excess of that.

B. The Utah Supreme Court's Invocation of "Utah's Values and Traditions" and State Farm's Alleged Lack of Remorse Do Not Justify the Utah Supreme Court's Departure from This Court's Reprehensibility Analysis

In its zeal to punish State Farm severely, the Utah Supreme Court defied this Court's admonition that only a modest punishment was warranted. The Utah Supreme Court defended its departure from this Court's reasoned evaluation of the circumstances of this case by invoking "Utah's values and traditions." A.7. Utah values and traditions, in the context of the Utah Supreme Court's opinion, appear to consist primarily of vague notions of punishing pride, defiance and lack of remorse and contrition. *See, e.g.*, A.12, 13 (State Farm "has not voiced so much as a whisper of apology or remorse;" has not "forsworn the conduct that caused the Campbells' injury;" "we voiced our incredulity over State Farm's protestations of blamelessness;" State Farm refuses "to concede any error or impropriety;" "lack of remorse").

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[8] The allegation that Mr. Noxon "manufactured" the story of the pregnant girlfriend is not supported by the record. The only trial testimony regarding the pregnant girlfriend came from plaintiffs' expert Stephen Prater, who, based on his reading of a deposition of Ray Summers, claimed that "[t]here was no evidence of any pregnant girlfriend." JA 2171. By a February 27, 2004 order of the Utah Supreme Court, the record in this case has now been supplemented with the Summers' deposition relied upon by Prater. In that deposition, Summers testified that he heard either "from a roommate" of Mr. Ospital or "from the man who owned the car" driven by Mr. Ospital at the time of the accident that Mr. Ospital was on his way to Ogden because of a phone call from his girlfriend saying that she was pregnant. Deposition of Ray Summers, 10/16/1995, at 87-88. Moreover, the record establishes that the "story" that Mr. Ospital was speeding, although not later accepted by the jury, was supported by the testimony of the state trooper who responded to the accident and by the assessment of the accident made by Mr. Ospital's insurance company. L. 1047-50, L. 1051-52; JA 3326.

The Utah Supreme Court's imposition of $9 million in punitive damages for State Farm's purported failure to apologize and show remorse directly contravenes the controlling federal constitutional principles articulated by this Court in this case and in *Gore*. This Court's opinion in this case made clear that punitive damages must address "the conduct that harmed the plaintiff" and that dissimilar conduct may not be punished under the guise of evaluating reprehensibility. *Campbell,* 538 U.S. at 420-24. State Farm's purported failure to apologize and express remorse while defending itself against the Campbells' bad faith claims was not part of and is by no means similar to the alleged wrongdoing in this case – *i.e.*, the purported bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. Consequently, the Utah Supreme Court's emphasis on lack of remorse is plainly improper under the reprehensibility guidepost as defined and analyzed in this Court's opinion.

The Utah Supreme Court's invocation of "Utah's values and traditions" does not justify its departure from the federal constitutional principles governing punitive damage awards. *See Campbell*, 538 U.S. at 427 ("While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*."). Indeed, the Utah Supreme Court's insistence on its own ad hoc evaluation of blameworthiness based upon Utah values and traditions is inconsistent with and undermines this Court's adoption in this case and in *Gore* of a five-factor analysis for reprehensibility. *See Campbell,* 538 U.S. at 419; *Gore,* 517 U.S. at 576-77. The five factors provide an objective, uniform framework, based upon traditional tort law principles, for evaluating reprehensibility. *See id.* The Utah Supreme Court's reliance on ill-defined, Utah-based notions of "reprehensibility" and the role of remorse and contrition in assessing punitive damages improperly transforms the federal constitutional due process standard for punitive damages into a subjective, arbitrary inquiry that may be answered differently in every state and in every court. Such a vague and variable standard would encourage unrea-

sonable and excessive awards.[9] It would deprive defendants, particularly non-resident defendants engaged in interstate commerce, of the constitutionally required notice of the severity of the punishment that their conduct might incur. *See Gore*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose."). State Farm certainly did not have constitutionally adequate notice that Utah's "values and traditions" required State Farm to apologize or repent or else face a huge, multi-million dollar punitive award.

This is not to say that states may not make different judgments as to the seriousness of particular acts or conduct or that differing state standards have no place in the punitive damages analysis. Differing state standards are incorporated into the constitutional punitive damages analysis through substantive state tort law, whether statutory or decisional, through which the states may declare conduct tortious or unlawful, thus opening the way to a potential punitive damages award. *Campbell*, 538 U.S. at 422. Differing state standards are also incorporated into the constitutional punitive damages analysis through the comparable penalties guidepost, which looks to the relevant state's legislative judgments as to the seriousness of the conduct at issue. Consideration of legislatively set penalties in the punitive damages analysis ensures that a state's value determinations are reflected in a punitive award, provides some measure of impartiality, and helps ensure that defendants receive constitutionally adequate notice of the severity of the punishment that a particular jurisdiction may impose. *Cf. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (a comparable civil

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[9] The Utah Supreme Court itself acknowledged that "any determination of reprehensibility inevitably implicates moral judgments and is therefore susceptible to an arbitrary, inexplicable, and disproportionate outcome" and that the five factor analysis is intended to provide more objective "measuring tools." A.8. The Utah Supreme Court, however, applied the *Campbell* reprehensibility factors in an arbitrary and unsupportable way so as to reach a disproportionate outcome. *See* Point I.A. *supra*. That outcome cannot be justified through an invocation of Utah values and traditions.

penalty reflects "legislative judgments concerning appropriate sanctions for the conduct at issue").

In marked contrast to a legislative determination embodied in a statute, the Utah Supreme Court's invocation of state "values and traditions" in its assessment of reprehensibility produces an ad hoc, subjective inquiry that is untethered to any objective standard that would restrain punitive damages. If permitted to stand as precedent, the Utah Supreme Court's reliance on state "values and traditions" to trump the required constitutional analysis would result in a return to arbitrary and grossly excessive punitive awards unrestrained by definite and ascertainable standards. As such, it is contrary to the punitive damages jurisprudence of this Court. *See Campbell,* 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"). There is no place in our civil justice system for bypassing the due process protections in the United States Constitution to punish pride and a lack of remorse, which in any case do not constitute unlawful conduct.

Moreover, in punishing State Farm's perceived pride and lack of remorse the Utah Supreme Court is not punishing State Farm's conduct toward the Campbells, but is punishing State Farm for what it perceives as State Farm's general moral failings as well as for defending itself and appealing this case in court. *See* Point I.C *infra*. Such punishment is foreclosed by this Court's opinion in this case, which makes clear that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Campbell,* 538 U.S. at 423.

In sum, the Utah Supreme Court's skewed analysis of the reprehensibility of State Farm's conduct toward the Campbells improperly placed that conduct at the far extreme of reprehensibility. Given the Utah Supreme Court's analysis, it is difficult to fathom where on the reprehensibility scale such matters as conduct aimed at intentionally causing severe physical injuries or conduct involving deliberate, repeated violations of a plaintiff's constitutional rights would find room. Clearly, the Utah Supreme Court has improperly inflated and overdrawn the reprehensibility of State Farm's conduct. The Utah Supreme Court's reprehensibility analysis

with its emphasis on remorse, pride and repentance cannot, as a matter of due process, support the imposition of a $9 million punitive award.

C. The $9 Million Punitive Award Improperly and Unconstitutionally Punishes State Farm for Its Litigation Conduct and Arguments in Defending the Bad Faith and Punitive Damages Case

In its analysis of reprehensibility and of State Farm's purported lack of remorse, the Utah Supreme Court relied heavily upon State Farm's efforts in defending itself at the bad faith/punitive damages trial and in pursuing its appeal. Indeed, the Utah Supreme Court is emphatic in directing its opprobrium to arguments made by State Farm's attorneys, as well as to testimony by State Farm employees, who said that they were proud of State Farm. Reiterating its earlier opinion in this case, the Utah Supreme Court stated:

> State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence.
>
> In *Campbell I*, we voiced our incredulity over State Farm's protestations of blamelessness. We noted: "State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case. Rather, testimony at trial indicated that State Farm was 'proud' of the way it treated the Campbells. Further, State Farm asserts [in its appellate brief] that it is in fact a 'victim' in this case because it is the target of the secret 'conspiracy' perpetrated by the Campbells, Ospital, Slusher, and their attorneys to bring this bad faith lawsuit and to share any recovery received." . . . The Supreme Court did not take issue with this observation. Since *Campbell I*, State Farm has directed us to no evidence suggesting that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of

pride and victimization. A.13.[10]

Surely, this Court's opinion in this case cannot be read to endorse imposition of punitive damages on the basis of a litigant's exercise of its constitutionally protected right to defend itself. But that is precisely what the Utah Supreme Court has done by using State Farm's litigation decisions, testimony, and legal arguments in defending against the Campbells' bad faith claims and appealing the judgment against it as a predicate for a determination of extreme blameworthiness meriting severe punishment.[11] The Utah Supreme Court's decision impermissibly threatens increased punitive damages whenever a defendant chooses to contest tort liability, unconstitutionally burdening the due process rights of defendants in civil litigation. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (due process requires that defendants in civil litigation have an adequate opportunity to defend against the imposition of liability) (citing *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932)).

The Utah Supreme Court's punitive condemnation of a

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[10] The Utah Supreme Court's criticism of State Farm's feelings of "victimization" is directed at arguments made by State Farm on appeal concerning the exclusion of evidence of the secret agreement, entered into by Slusher and the Ospitals, the third-party claimants in the underlying accident case, to pursue a bad faith claim against State Farm should the underlying trial result in an excess verdict. That secret agreement provided that the Ospitals and their attorneys would aid Slusher first in the trial of Slusher's claims against Campbell and later in litigation to be brought against State Farm for bad faith. *See* L.1647. The Ospitals' attorney explained to Slusher's attorney that "[b]efore this [bad faith] action can be filed, we would have to obtain a Judgment against . . . Campbell[] which . . . would exceed his policy limits. We then obtain an assignment of all claims from Mr. Campbell, in turn for an agreement not to execute against him personally, and we then bring a bad faith action against State Farm." R. 5897. On appeal before the Utah Supreme Court, State Farm argued that it should have been allowed to present evidence of this agreement in the bad faith trial, as the agreement (which was unknown to State Farm at the time of the original trial) was relevant to the jury's assessment of the reasonableness of State Farm's decision not to settle and helped explain why that trial resulted in so poor an outcome for Mr. Campbell. *See* Brief of Appellant, 6/7/1999, at 46-52.

[11] Of course, under Fed. R. Civ. P. 11 and Fed. R. App. P. 38 and their state analogs as well as under their inherent power, courts are authorized to sanction frivolous or improper briefs and improper courtroom conduct.

defendant's efforts in litigation is not without parallel. Other courts, in decisions post-dating this Court's opinion in this case, also have improperly relied upon a defendant's litigation strategy as justifying a higher punitive damages award. *See, e.g., Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (citing defendant's "aggressive defense" and "host of frivolous evidentiary arguments" in upholding punitive damage award); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419-22 (Pa. Super. Ct. 2004) (affirming $2.8 million punitive award, with a 10:1 ratio, largely on the basis of the defendant insurer's conduct during trial of bad faith claim against it rather than the underlying conduct giving rise to the bad faith claim).

In contrast to these decisions and the decision of the Utah Supreme Court, California courts have consistently held that, as a matter of law, a "defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (Ct. App. 2001); *accord, e.g., Palmer v. Ted Stevens Honda,* 193 Cal. App.3d 530, 537-40 (Ct. App. 1987). In so ruling, California courts have looked to the constitutional and tort law principles that mandate that there can be "no tort of 'malicious defense' arising from a defendant's conduct in defending a lawsuit, or 'malicious filing of an appeal' for filing an appeal in bad faith." *De Anza,* 94 Cal. App. 4th at 918 (citations omitted). As one California court explained, "due process considerations are implicated to the extent that tort damages are based on evidence that a defendant filed motions, appeals and other legal proceedings during the course of litigation or opposed motions filed by the other party." *Id.* "Pursuing authorized forms of relief before courts or other governmental tribunals is a protected right and cannot be the basis for tort liability" except in the narrow circumstances where a properly pleaded action for malicious prosecution may be brought. *Id.* Likewise, a defendant's conduct of its defense or its briefs on appeal do not form a constitutional basis for imposing punitive damages. *Id.* at 918-19.

The Utah Supreme Court's imposition of punitive damages for State Farm's failure to concede liability at trial, for

testimony by its employees that they were proud of State Farm, and for arguments made by State Farm's counsel during the trial and on appeal, punishes conduct that is dissimilar and unrelated to State Farm's conduct toward the Campbells – *i.e.*, the alleged bad faith failure to settle the third-party claims against Mr. Campbell within policy limits. That punishment is contrary to the constitutional principle enunciated by this Court that punitive damages must be based upon the defendant's conduct toward the plaintiffs upon which the plaintiffs' claims are based and that a defendant's dissimilar conduct does not furnish a permissible basis for punitive damages. *See Campbell*, 538 U.S. at 422-23, 427. As Judge Klein reasoned in his dissent in *Hollock*, punitive damages in a bad faith case should be directed toward punishing "only conduct that relates to the bad faith harm." 842 A.2d at 423 (Klein J., dissenting). Basing punitive damages on a defendant's actions during the bad faith trial itself contravenes this Court's holding that "'[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.'" *Id.* at 423 (Klein, J., dissenting) (quoting *Campbell*, 538 U.S. at 422). As Judge Klein pointed out, defense strategy and actions during a bad faith trial are not part of the original conduct:

> [B]ecause the duty of good faith and fair dealing is extinguished once a settlement has been reached or a judgment entered, the insurer's fiduciary duty does not extend past that point. Thus, no bad faith can be imputed to the insurer for actions taken post-judgment or post-settlement . . . . No action taken by [defendant] in defense of the bad faith claim can be considered in determining whether [defendant] committed bad faith in the investigation and handling of the underlying UIM claim. *Id.* at 423.

The Utah Supreme Court's continued reliance on State Farm's appellate briefing as a basis for punitive damages is particularly egregious, given that State Farm has been shown to have been right in its objections to the Utah trial procedures that unconstitutionally allowed this case to be "used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country," *Camp-*

bell, 538 U.S. at 420, and that the $145 punitive damages award reinstated by the Utah Supreme Court was unconstitutional and in violation of State Farm's due process rights. *Id.* at 429. Nevertheless, the Utah Supreme Court in its new opinion reiterates its earlier criticism of State Farm's appellate briefing as showing "defiance" and feelings of "victimization." A.13. Likewise, the Utah Supreme Court also repeats its criticism of State Farm's feeling of "pride," based on the individual testimony of certain State Farm employees who (when asked by plaintiffs' counsel) stated that they were proud of State Farm and of being State Farm employees.[12]

It is evident that meting out punitive damages in the millions of dollars based upon a defendant's arguments on appeal or upon its attempts to defend against liability and/or the imposition of punitive damages at trial will, if permitted to continue, have a chilling effect on the defendant's lawful exercise of its due process rights to defend itself. This Court in its opinion in this case held that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." *Campbell*, 538 U.S. at 421; *see also Gore*, 517 U.S. at 572-73 & n.19 ("Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred") (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the

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[12] The preposterousness of the Utah Supreme Court's citing that testimony as supporting the $9 million punitive damages award it has now imposed is shown by the testimony itself. Paul Short, a State Farm claims adjuster who was not involved in handling the claims against the Campbells, testified as follows:

> Q [Plaintiffs' attorney] You would be proud to have State Farm treat any insured the way they've treated the Campbells.
>
> A I'm proud of the way State Farm treats everybody. State Farm believed in Mr. Campbell, when the underlying case was tried –
>
> MR. CHRISTENSEN: That's all right, you've answered my question. Thank you.

JA 2712. Mr. Short's innocuous testimony, according to plaintiffs' expert Stephen Prater, "suggests that they're proud and they've done nothing wrong in this case, which I think is outrageous." JA 2453. State Farm adjuster Jerry Stevenson, who worked on the Campbell file, also testified that he was "proud" of State Farm although "sorry" for any policyholder's trauma, worry or sleepless nights. *See* JA 2831-2833.

most basic sort")). The Utah Supreme Court, in punishing State Farm for vigorously defending itself at trial and on appeal, is punishing conduct that is lawful in Utah and everywhere else in this country. No legitimate state purpose is served by penalizing such lawful conduct, and a punitive damages award based upon such lawful conduct is arbitrary and violates due process. *See Campbell*, 538 U.S. at 416-17, 421. The multiple and serious due process considerations raised by the Utah Supreme Court's assessment of punishment based on a defendant's efforts to defend itself at trial and on appeal warrant resolution by this Court.

II. The Utah Supreme Court's Application of the Ratio Guidepost Is Erroneous and Inconsistent with This Court's Opinion

In determining that a 9 to 1 ratio comported with constitutional limits in this case, the Utah Supreme Court flatly refused to honor the spirit and letter of this Court's opinion. In its opinion, this Court set forth a basic principle limiting the ratio of punitive damages to compensatory damages in cases where compensatory damages are substantial. This Court opined: "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425. The Court then specifically determined that this principle governed the punitive damages award *in this case*. In reaching that conclusion, the Court stressed that the substantial emotional distress damages of $1 million awarded to the Campbells already contained a punitive element. *Id.* at 426, 429. The Court explained that

> [t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

Id. at 426 (citing Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)). Accordingly, this Court concluded that

"[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

The Utah Supreme Court turned this Court's ratio analysis on its head. The Utah Supreme Court began its analysis by inaccurately restating and limiting this Court's rule on punitive damages in cases where substantial compensatory damages have been awarded as "applicable where a sizeable compensatory damages award for *economic* injury is coupled with conduct of *unremarkable reprehensibility*." A.15-16 (emphasis added). The Utah Supreme Court also concluded that, contrary to this Court's opinion, the emotional distress damages in this case contained no punitive component because the trial court had remitted such damages from $2.6 million to $1 million so as to reflect the purported actual worth of the Campbells' distress. A.15.[13] The Utah Supreme Court then proceeded to the conclusion that conduct which "causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm" and that "such conduct is a candidate for the imposition of punitive damages in excess of a 1-to-1 ratio to compensatory damages." A.16. Thus, according to the Utah Supreme Court, "[s]imply put, the trial court's determination that State Farm caused the Campbells $1 million of emotional distress warrants condemnation in the up-

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[13] With regard to the Utah Supreme Court's reliance on the "efforts of the jury" "ensur[ing] that the compensatory damages award was . . . based on considered evaluation of the degree of emotional harm inflicted on the Campbells by State Farm" (A.15), it is worth noting that plaintiffs' counsel in his closing statement stressed to the jury that if they awarded an insufficient amount of compensatory damages, any punitive damages award they made would be "subject to attack in motions hereafter or on appeal." JA 3243 ("Anything less [than $1.5 million] in compensatory damages will then call into question whether or not the punitive damages may be awarded, because again I emphasize the compensatory damages are needed to sustain a large punitive damage award. Without it, it is subject to attack in motions hereafter or on appeal."). Moreover, in its oral ruling, the trial court expressly included the "outrageousness of State Farm's overall plan" among the factors "justifying the amount of [emotional distress] damages that the Court has awarded." R.10292:115.

per single-digit ratio range rather than the 1-to-1 ratio urged by State Farm." A.16. The Utah Supreme Court's logic is directly contrary to this Court's opinion and improperly relies upon the $1 million dollar emotional distress damages to jack up the punitive award, rather than to mitigate it in accordance with this Court's opinion.

The Utah Supreme Court was not free to reject this Court's determination that the emotional distress damages in this case contained a punitive element as an "abstract proposition" that failed to take into account that the trial court had purportedly "purged" the emotional distress damages of any punitive element when it remitted them to $1 million. A.15. Contrary to the Utah Supreme Court's contention, this Court's determination that emotional distress damages contain a built-in punitive component was not merely "an abstract proposition." Rather, as discussed above, this Court expressly applied that proposition to the emotional distress damages *in this case*. *See Campbell*, 538 U.S. at 426, 429. Moreover, the evidence regarding the degree of the Campbells' emotional distress was discussed by the parties in their briefing before this Court, and the trial court's decision regarding remittitur was reproduced in the parties' joint appendix and was cited to this Court in the parties' briefing. JA 3322, 3359-69; Pet'r Br. at 5; Resp't Br. at 3. Consequently, the Utah Supreme Court's claim that the trial court's reduction of the emotional distress damages had "purged" those damages of any punitive component is contrary to this Court's opinion and impermissible under the Court's mandate. Moreover, even a cursory reading of the trial court's opinion reveals that in setting the Campbells' emotional distress damages at $1 million, the trial court relied as much on evidence of what it perceived to be the outrageous nature of State Farm's conduct as upon evidence of the emotional distress actually suffered by the Campbells. JA 3367; *see also* p. 26 n.13 *supra*. Indeed, the trial court acknowledged that "[t]here was a relatively limited period of time in which the primary stressor, i.e., the threat of financial ruin, was a real threat to the Campbells" and that "[t]here was a lack of objective evidence of emotional or mental distress." JA 3364. Thus, the trial court's opinion in fact confirms the correctness of this Court's conclusion that the emotional distress damages in the case contained a punitive element.

In any case, the principle enunciated by this Court – that, in cases where substantial compensatory damages have been awarded, a 1 to 1 ratio may represent the outermost limit of due process – was reinforced by, but not dependent upon, this Court's conclusion that the emotional distress damages *in this case* contained a punitive element. In its opinion, this Court acknowledged that any substantial compensatory award may have a punitive and deterrent effect. *See Campbell*, 538 U.S. at 419 (stating that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence") (emphasis added). Indeed, an award of emotional distress damages, whether or not it reflects a deterrent or punitive intent upon the part of the judge or jury, normally has a considerable deterrent and punitive effect. As State Farm argued before this Court, "the $1 million compensatory award has a substantial deterrent effect in itself, because it is far in excess of the amount (the $50,000 policy limit minus the cost of litigation) that State Farm could have hoped to save by litigating rather than settling the third-party claims against Mr. Campbell." Pet'r Br. at 32 n.30.

In sum, the Utah Supreme Court's disregard of the 1 to 1 ratio approved by this Court was constitutionally erroneous as well as inconsistent with the mandate of this Court. This Court should grant State Farm's petition to correct the Utah Supreme Court's refusal to follow the mandate of this Court.

III. The Utah Supreme Court's Analysis of the Comparable Penalties Guidepost Is Inconsistent with This Court's Opinion and Does Not Support the $9 Million Punitive Damages Award

Under the Utah Supreme Court's opinion on remand, the comparable penalties guidepost is stripped of its function of imposing reasonable limits on punitive damages. Although the Utah Supreme Court acknowledged that the relevant civil penalty under Utah law was a $10,000 fine, the Court found that its $9 million award did not "dwarf" that fine and therefore "h[e]ld fast to [its] conviction that a punitive damages award of $9,018,780.75 is in line with the third *Gore* guide-

post." A.17. The Court reasoned that because this Court had "endorsed" a $1 million punitive damages award, "which is one hundred times greater than the $10,000 fine," then, presumably, a $9 million award, 900 times greater than the relevant civil penalty, must also pass constitutional muster. A.17. State Farm respectfully submits that the comparable $10,000 civil penalty in no way supports a $9 million punitive award in this case, but rather requires a substantial lowering of that award.

The Utah Supreme Court's opinion improperly discounted the importance of the comparable penalties, terming the "quest" to apply this guidepost "quixotic." A.17. The Court attempted to justify its disregard of the legislative judgment reflected in the $10,000 penalty provided by Utah law for fraudulent acts by insurers by noting that "while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes." A.17. Whether the Court meant that the Utah legislature is somehow equating an act of insurer misconduct with the most serious felonies or whether it simply meant that the Utah legislature is somehow irrational in the penalties it sets and that its judgments may therefore be accorded less weight, the Court's disparagement of the comparable penalties guidepost is illogical and erroneous. The fact that the criminal penalties provided by Utah law for serious felonies committed by *persons*[14] include a $10,000 fine in addition to lengthy prison sentences has little or no relevance to the fact that the Utah legislature has seen fit to impose a modest $10,000 fine for a single act of fraud by insurance companies and certainly does not authorize the Utah Supreme Court to disregard the comparable penalties guidepost.[15]

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[14] Utah Code Ann. § 76-3-301 (2003), cited by the Utah Supreme Court, expressly states that it does not apply to corporations, but only to natural persons.

[15] Despite this Court's rejection of the Utah Supreme Court's "speculat[ion] [in its previous opinion] about the loss of State Farm's (continued...)

The Utah Supreme Court's reluctance to give meaning and force to the comparable penalties guidepost belies the Court's asserted allegiance to Utah values, which are embodied in the "legislative judgments concerning appropriate sanctions for the conduct at issue," *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J. concurring in part and dissenting in part), and not in the subjective and personal views of judges. The comparable penalties guidepost in this case, if the Utah Supreme Court had been willing to heed it, clearly points to the excessiveness of the $9 million punitive damages award.

CONCLUSION

This Court should grant State Farm's petition for a writ of certiorari. Because the Utah Supreme Court's decision is plainly inconsistent with this Court's mandate in its opinion in this case, this Court should summarily reverse the Utah Supreme Court's decision pursuant to Supreme Court Rule 16 and instruct the Utah Supreme Court to enter a punitive damages award in an amount "at or near" the amount of compensatory damages, *i.e.*, no more than $1 million. *See Campbell*, 538 U.S. at 429. In the alternative, this Court should afford plenary review, with briefing and oral argument by the parties, of the important constitutional issues raised by the Utah Supreme Court's decision.

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[15](...continued)
business license," *Campbell*, 538 U.S. at 428, the Utah Supreme Court repeated in its new opinion its unsupported surmise that "State Farm's behavior, particularly if it were to become a pattern in Utah, may indeed be justification for termination of its license . . . ." A.17 n.8. The Court cites no Utah statute or regulation that would subject an insurance company to termination of its license for a single act of the kind at issue in this case. Nor can the Court's insistence on imagining that this excess verdict case could "become a pattern in Utah" justify using the loss of license as a comparable penalty in this case.

Respectfully Submitted,

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DECISION OF THE UTAH SUPREME COURT
DATED APRIL 23, 2004

Supreme Court of Utah.

Inez Preece CAMPBELL and Matthew C. Barneck, Special Administrator and Personal Representative of the Estate of Curtis B. Campbell, Plaintiffs, Appellees, and Cross-Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant, Appellant, and Cross-Appellee.

No. 981564

April 23, 2004

On Remand from the United States Supreme Court

NEHRING, Justice:

¶ 1 We take up this case after remand from the United States Supreme Court, which held that the imposition of a $145 million punitive damages award against State Farm Mutual Automobile Insurance Company in favor of State Farm's insured, Curtis B. Campbell, and his wife, Inez Preece Campbell, was excessive and violated the due process clause of the Fourteenth Amendment to the Constitution of the United States. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (*Campbell II*) (rev'g 2001 UT 89, 65 P.3d 1134 (*Campbell I*)). The Supreme Court directed us to recalculate the punitive damages award under principles articulated in its decision. We have performed this task and reduced the jury's award to $9,018,780.75 in punitive damages, a figure nine times the amount of compensatory and special damages awarded to the Campbells.

I. FACTS AND PROCEDURAL HISTORY[1]

¶ 2 Mr. Campbell was responsible for an automobile accident that disabled Robert Slusher and killed Todd Ospital. At the time, Mr. Campbell was insured by State Farm up to $25,000. State Farm chose not to settle the case. At trial, Mr. Campbell was found 100 percent responsible and a judgment was entered against him for $135,000. State Farm refused to pay this amount, suggesting instead that the Campbells put their house up for sale to pay off the judgment. Although State Farm did eventually pay the judgment, the Campbells sued for bad faith. At trial, the Campbells were permitted to introduce evidence that State Farm had a comprehensive nationwide policy of handling certain claims in a like manner.

¶ 3 The jury awarded the Campbells $2,086.75 in special damages, $2.6 million in compensatory damages, and $145 million in punitive damages. The trial judge remitted this amount to $1 million in compensatory damages and $25 million in punitive damages. On appeal, we reinstated the original jury verdict of $145 million in punitive damages. State Farm then appealed our decision in *Campbell I* to the United States Supreme Court, which reversed and remanded the case to us, after determining that $145 million violated due process.

¶ 4 We first address the limitations imposed on and discretion extended to us by the Supreme Court's remand order. We then turn to our application of the Supreme Court's principles set forth in *Campbell II*.

II. DUTY ON REMAND

¶ 5 State Farm suggests that our duty in the face of a remand order demands unwavering fidelity to the letter and spirit of the mandate. *Thurston v. Box Elder County*, 892 P.2d 1034, 1038

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[1] A complete recitation of the facts in this case is available in *Campbell I*, 2001 UT 89 at ¶¶ 2-12, 65 P.3d 1134. An abbreviated version, applying only facts deemed relevant by the United States Supreme Court is available in *Campbell II*, 538 U.S. at 412-15.

(Utah 1995).[2] We agree. State Farm further argues that the letter and spirit of the mandate erect an impenetrable ceiling on the punitive damages award of $1,002,086.75, based on a 1-to-1 ratio of punitive damages to compensatory damages.

¶ 6 State Farm makes two arguments in aid of this contention. First, it invokes what it characterizes as the "mandate rule" which, it claims, elevates all of the statements in the Supreme Court's opinion to the status of a holding, thereby binding us to what would otherwise be properly deemed dicta. Second, having identified and broadly defined a "mandate rule," State Farm then turns to the text of *Campbell II* which states that "[a]n application of the [relevant] guideposts to the facts of this case ... likely would justify a punitive damages award at or near the amount of compensatory damages." *Campbell II*, 538 U.S. at 429. State Farm claims that, when given the dignity required by the mandate rule, this language limits our punitive damages award to the amount of compensatory damages.

¶ 7 We are both sensitive to our responsibility as an inferior court to honor the Supreme Court's remand order with utmost fidelity and skeptical of claims that our duties can be reduced to an enumerated task list imposed by a "mandate rule." We do not, therefore, interpret the Supreme Court's mandate to be as restrictive as State Farm claims. Had the letter of the Supreme Court's mandate included an express punitive damages award, our responsibilities would be easily discharged. The Supreme Court declined, however, to fix a substitute award, choosing instead to entrust to our judgment the calculation of a punitive award which both achieves the legitimate objectives of punitive damages and meets the demands of due process. We take seriously the Supreme Court's direction that "[t]he proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts." *Id.*

¶ 8 By assigning to us the duty to resolve the issue of punitive damages by fixing an award, the Supreme Court

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[2] Although both parties briefed this issue for us, the Supreme Court did not address it.

signaled its intention to vest in us *some* discretion to exercise our independent judgment to reach a reasonable and proportionate award. To faithfully exercise our discretion, we must properly identify and apply the Supreme Court's principles announced in *Campbell II*. These principles restated and refined the analytical tools first announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). In *Gore*, the Supreme Court issued an invitation to the Alabama Supreme Court to undertake on remand an "independent determination" of an appropriate punitive damages award consistent with the guideposts erected by the Supreme Court. *Id.* at 586. We understand our duties to mirror those assigned to the Alabama Supreme Court, supplemented by the evolving principles of punitive damages jurisprudence announced in *Campbell II*.

¶ 9 It is within this delegated responsibility that the "spirit" of the Supreme Court's order of remand resides, presenting the greater challenge to us to honor that mandate. Accordingly, our view of the limits of our discretion to award punitive damages relies little on the "mandate rule" or any similar interpretive aid. Rather, the text of *Campbell II* provides us with clear direction.

¶ 10 The Supreme Court has long held the view that, except when they transgress due process guarantees, punitive damages awards are properly the province of the states. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion."); *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) ("[T]he propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.").

¶ 11 Reinforcing our conclusion that we may properly exercise our judgment in fixing the punitive damages award are certain themes prominently featured in *Campbell II* and *Gore*. In both cases, the Supreme Court resisted the impulse to draw

bright lines or create categorical classifications in fixing punitive damages awards, electing instead to adopt general standards and guideposts. *Campbell II*, 538 U.S. at 425; *Gore*, 517 U.S. at 582-83. The Supreme Court has also consistently recognized punitive damages as a means to "further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568. Taken together, these themes create a logical underpinning to an interpretation of the Supreme Court's remand order which sanctions and expects us to exercise a considerable measure of independent judgment in fixing the punitive damages award.

¶ 12 Even the Supreme Court's observation that this case "likely would justify a punitive damages award at or near the amount of compensatory damages" does not cause us to retreat from our view that we have been granted discretion to determine the amount of punitive damages. *Campbell II*, 538 U.S. at 429. Contrary to State Farm's assertions, this language cannot reasonably be interpreted as a conclusive determination that the magnitude of State Farm's blameworthiness merits a punitive damages award no greater than the compensatory award. These are words of prediction, not direction, and are wholly compatible with a remand order which both instructs us to apply the Supreme Court's standards with fidelity and recognizes that Utah courts are best able to address our state's legitimate interests. Consistent with that view, the Supreme Court has clearly communicated its intention to cede to us the responsibility to assess the reprehensibility of State Farm's conduct, to identify Utah's legitimate interests, and to exercise reasoned judgment in fixing punitive damages.

III. ANALYSIS LIMITED TO ACTIVITY IN UTAH

¶ 13 While authorizing us to determine the amount of the punitive damages award, the Supreme Court leashed us more tightly to the established analytical guideposts of *Gore* in two ways: by narrowing the scope of relevant evidence which we may consider in evaluating the reprehensibility of State Farm's conduct, and by providing more detailed guidance for determining the relationship between compensatory and punitive damages. *Campbell II*, 538 U.S. at 419-22, 424-28.

¶ 14 The Supreme Court chided us for basing our reinstate-

ment of the jury's $145 million punitive damages award on State Farm's "nationwide policies rather than for the conduct direct [sic] toward the Campbells." *Id.* at 420. The Supreme Court found impermissible our reliance on State Farm's conduct outside Utah in measuring the reprehensibility of the company's conduct. *Id.* at 421. Drawing on views expressed in *Gore*, the Supreme Court limited evidence that can properly be weighed in the reprehensibility scale to behavior which took place within our borders and was directed at the Campbells. *Id.* at 421-22. We are mindful that it was our consideration of irrelevant extra-territorial evidence concerning reprehensibility which attracted most of the Supreme Court's criticism in *Campbell II*. We therefore reevaluate State Farm's conduct based solely on its behavior that affected the Campbells and took place within Utah.

¶ 15 The Supreme Court stopped well short, however, of punctuating its disagreement with the evidence we considered in our analysis by pinning State Farm's behavior to a particular location along the reprehensibility continuum. It instead simply issued the mandate that "a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id.* at 419-20.

¶ 16 Had the Supreme Court injected into *Campbell II* its own conclusive findings concerning the degree of State Farm's blameworthiness, it would have announced a federal standard measuring reprehensibility. By creating such a national reprehensibility standard, however, the Supreme Court would have collided with its own rationale for limiting the scope of relevant reprehensibility evidence to intra-state conduct. The Supreme Court's rejection of our consideration of State Farm's conduct in other states was grounded in the recognition that much of the out-of-state conduct was lawful where it occurred. *Id.* at 422. The Supreme Court respected states' autonomy to make policy choices about the lawfulness of human and corporate behavior within their own borders, and used that deference to justify disallowing out-of-state conduct as an indicator of reprehensibility.

¶ 17 Just as behavior may be unlawful or tortious in one state

and not in another, the degree of blameworthiness assigned to conduct may also differ among the states. As long as the Supreme Court stands by its view that punitive damages serve a legitimate means to satisfy a state's objectives to punish and deter behavior which it deems unlawful or tortious based on its own values and traditions, it would seemingly be bound to avoid creating and imposing on the states a nationwide code of personal and corporate behavior.

¶ 18 In this instance, we find the blameworthiness of State Farm's behavior toward the Campbells to be several degrees more offensive than the Supreme Court's less than condemnatory view that State Farm's behavior "merits no praise." *Id.* at 419. We reach this conclusion after applying the relevant reprehensibility standards to the facts approved for consideration of State Farm's reprehensibility in *Campbell II*, and in light of Utah's values and traditions. We now turn to explaining how we exercised the discretion granted us by the Supreme Court to award the Campbells $9,018,780.75 in punitive damages.

IV. FEDERAL DUE PROCESS GUIDEPOSTS

¶ 19 In *Gore*, the Supreme Court established three guideposts for punitive damages awards in *Gore*: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Campbell II*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 574-75). The Supreme Court structured its constitutional review of our reinstatement of the jury's $145 million punitive damages award in *Campbell I* within the framework of these guideposts.

¶ 20 In *Campbell I*, we conducted two separate reviews of the trial court's punitive damages award, under both state and federal law.[3] In *Campbell II*, the Supreme Court limited its

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[3] In Utah, punitive damages are analyzed under a seven-factor test commonly known as the *Crookston* standards. The *Crookston* factors are:

(continued...)

review of the constitutionality of our award to the *Gore* guideposts. Since *Campbell II*, we have continued to apply our state standards, recognizing that they substantially reflect the Supreme Court's directives and modifying them as necessary to fully meet the federal requirements. *See, e.g., Smith v. Fairfax Realty*, 2003 UT 41, ¶ 31, 82 P.3d 1064. However, in this case we follow the lead of the Supreme Court and restrict our review to the guideposts set forth in *Gore*.

A. Reprehensibility

¶ 21 Just as we reinstated the jury's $145 million punitive damages award primarily because of our assessment of the reprehensibility of State Farm's conduct, *Campbell I*, 2001 UT 89, ¶¶ 27-36, 53, 65 P.3d 1134 (analyzing reprehensibility under *Crookston* standards), so do we again look primarily to *Gore's* reprehensibility guidepost to fix those damages on remand. We do so in recognition of the Supreme Court's reaffirmation in *Campbell II* that reprehensibility is " '[t]he most important indicium of the reasonableness of a punitive damages award.' " 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575).

¶ 22 Because any determination of reprehensibility inevitably implicates moral judgments and is therefore susceptible to an arbitrary, inexplicable, and disproportionate outcome, the Supreme Court has fashioned certain measuring tools. These include consideration of whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated

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[3] (...continued)
(i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 808 (Utah 1991); *see also Crookston v. Fire Ins. Exch.*, 860 P.2d 937 (Utah 1993).

> incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id.

¶ 23 First, we consider whether the harm was economic or physical. We are mindful of the Supreme Court's observation that "the harm [in this case] arose from a transaction in the economic realm, not from some physical assault or trauma." *Id.* at 426. We do not, however, read this comment to foreclose our value-based assessment of the type of injuries which may flow from the abuse of transactions in the economic realm, nor to bar us from judging the reprehensibility of such abusive conduct. The Supreme Court's observation is carefully phrased. It does not classify the injury inflicted on the Campbells by State Farm as "economic." Rather, it notes that the transaction which gave rise to the injury was in the "economic realm."

¶ 24 If we were to hold the view that insurance has no purpose beyond providing economic compensation for loss, there would be little reason to dwell on this first reprehensibility factor. So interpreted, not only would the harm caused by State Farm be purely economic in nature, but the economic harm sustained by the Campbells would be minimal. State Farm ultimately paid the entire judgment which was awarded against the Campbells, including amounts in excess of the policy limits. However, we do not believe that the Campbells' injuries were limited to their economic loss.

¶ 25 Instead, we recognize that the gravity of harm which an insurer may potentially inflict on an insured is unique to the nature of the product and service that insurance provides. Life is fraught with uncertainty and risk. In Utah alone, our citizens pay nearly $1 billion annually in automobile insurance premiums in an effort to ameliorate the anxiety caused by uncertainty and risk.[4]

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[4] Utah Department of Insurance, 2002 Utah Market Share Report--Private Passenger Auto, available at http://www.insurance.state.ut.us/MS/MS_PPAuto.pdf (stating that in 2002, Utahns spent $969,222,336 on automobile insurance premiums) (last visited Apr. 16, 2004).

¶ 26 We have shaped our law relating to first party insurance contracts to recognize the practical reality "that insurance frequently is purchased not only to provide funds in case of loss, but to provide peace of mind for the insured or his beneficiaries." *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 802 (Utah 1985). Peace of mind clearly plays a central role in accounting for the appeal of liability insurance.

> In insurance each party must take a risk. But it is inaccurate to assert that if the insured event does not occur then the insured receives nothing in return for the premium payment made. Each insured receives at the time of contract formation present assurance of compensation if the loss occurs which is a valuable peace-of-mind protection.

1-1 *Holmes' Appleman on Insurance 2d* § 1.3.

¶ 27 An allegation that one's negligent conduct has caused the injury or death of another inevitably triggers fear and apprehension that insurance succors.

> Insureds buy financial protection and peace of mind against fortuitous losses. They pay the requisite premiums and put their faith and trust in their insurers to pay policy benefits promptly and fairly when the insured event occurs. Good faith and fair dealing is their expectation. It is the very essence of the insurer-insured relationship. In some instances, however, insurance companies refuse to pay the promised benefits when the underwritten harm occurs. When an insurer decides to delay or to deny paying benefits, the policyholder can suffer injury not only to his economic well-being but to his emotional and physical health as well. Moreover, the holder of a policy with low monetary limits may see his whole claim virtually wiped out by expenses if the insurance company compels him to resort to court action.

2-8 *Holmes' Appleman on Insurance 2d* § 8.7.

¶ 28 As the facts of this case make clear, misconduct which occurs in the insurance sector of the economic realm is likely to cause injury more closely akin to physical assault or trauma

than to mere economic loss.[5] When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible than, for example, the undisclosed repainting of an automobile which spawned the punitive damages award in *Gore*.[6]

¶ 29 State Farm expressly assured the Campbells that their assets would not be placed at risk by the negligence and wrongful death lawsuit brought against them. The company then unnecessarily subjected the Campbells to the risks and

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[5] In *Campbell II*, the Supreme Court articulated bipolar injury categories of "economic" and "physical." 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576-77). These categories are well suited to highlight the Supreme Court's view that the injury suffered by a misled and disappointed BMW purchaser could not reasonably justify the moral outrage which ought properly be reserved for conduct that results in physical harm. State Farm has sought to exploit, unhelpfully in our view, an exaggerated economic versus physical dichotomy. For example, as we observed in *Campbell I*, State Farm attempted to diffuse the odious nature of its conduct by claiming that it did not "after all, involve murder, torture, or deliberate poisoning of the environment." 2001 UT 89 at ¶ 33, 65 P.3d 1134.

[6] In *Gore*, Dr. Gore bought a new black BMW from a BMW dealership. After driving it for nine months, he took it to an independent detailer to make it look "snazzier than it normally would appear." 517 U.S. at 563. The detailer determined that the car had been repainted to hide damage. *Id.* The damage was later shown to be caused by acid rain which settled on the car's exterior en route from Germany to the United States. *Id.* at 563, n. 1. Other cases in the punitive damages canon are equally distinguishable from this case. For example, in *Cooper*, Cooper Industries was sued by Leatherman Tool Group for trademark infringement after Cooper used photographs of a modified version of the Leatherman tool in its ads. 532 U.S. at 427-28. *TXO Production Corp. v. Alliance Resources Corp.* involved a slander of title to oil and gas rights owned by Alliance. 509 U.S. 443, 446, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). In a case most factually similar to the one at hand, employees of a company paid insurance premiums to an insurance agent who was obligated to turn over the premiums to the insurer. When the agent failed to do so, the insurance policies lapsed. When one employee tried to make a claim on her insurance policy, she was denied. Once this was discovered, the employees sued the agent for fraud. *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 5-6, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). However, in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 418, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), the court sustained a jury award finding Honda 80 percent liable for injuries sustained by the driver of a three-wheel all-terrain vehicle manufactured by Honda that overturned, certainly a physical, and not economic, harm.

rigors of a trial. State Farm disregarded facts from which it should have concluded that the Campbells faced a near-certain probability of having a judgment entered against them in excess of policy limits. When this probability came to pass, State Farm withdrew its expressions of assurance and told the Campbells to place a "for sale" sign on their house. These acts, all of which the Supreme Court conceded that State Farm had committed, *Campbell II*, 538 U.S. at 419, and for which State Farm has not voiced so much as a whisper of apology or remorse, caused the Campbells profound noneconomic injury.

¶ 30 It simply will not do to classify this injury as solely "economic" for the purposes of evaluating it under the first prong of the *Gore* reprehensibility test, and we decline to do so. We turn now to the remaining *Gore* indicia for evaluating reprehensibility.

¶ 31 The second factor in assessing reprehensibility is whether State Farm showed indifference or reckless disregard for the health and safety of the Campbells. There is little doubt that State Farm could reasonably have known that its conduct would cause stress and trauma to a policyholder. State Farm was clearly indifferent to this result, evincing a reckless disregard for the Campbells' peace of mind.

¶ 32 The third factor is whether the victims were financially vulnerable. It remains obvious to us that not only were the Campbells financially vulnerable, but their vulnerability enabled, if not motivated, State Farm's conduct. We need stray no further into the record than to the post-judgment advice given to the Campbells by State Farm's attorney that they put a "for sale" sign on their house to make this point. It is difficult to imagine State Farm making this statement to a sophisticated insured whom State Farm believed to have the wherewithal to protect himself from its predations.

¶ 33 Fourth, we consider whether the reprehensible conduct was repeated or merely an isolated incident. We take up this measure of reprehensibility with considerable caution because, although *Gore* instructs us to consider whether "the conduct involved repeated actions or was an isolated incident," *id.* (citing *Gore*, 517 U.S. at 576-77), the Supreme Court expressly found that we erred in determining that State Farm was a

recidivist. *Id.* at 423. Repeated misconduct justifies a more severe sanction both because it minimizes the likelihood that the conduct was a unique aberration and because it justifies the imposition of punitive damages as a deterrent. Although we are bound by the Supreme Court's finding that State Farm was not a recidivist, absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury, and that the citizens of Utah therefore have no reason to deter State Farm's future conduct. State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence.

¶ 34 In *Campbell I*, we voiced our incredulity over State Farm's protestations of blamelessness. We noted:

> State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case. Rather, testimony at trial indicated that State Farm was "proud" of the way it treated the Campbells. Further, State Farm asserts that it is in fact a "victim" in this case because it is the target of the secret "conspiracy" perpetrated by the Campbells, Ospital, Slusher, and their attorneys to bring this bad faith lawsuit and to share any recovery received.

2001 UT 89 at ¶ 35, 65 P.3d 1134 (internal citations omitted). The Supreme Court did not take issue with this observation. Since *Campbell I*, State Farm has directed us to no evidence suggesting that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of pride and victimization.

¶ 35 We will not and, consistent with our duty on remand, cannot invoke deterrence as a justification for punitive damages based on conduct dissimilar to that which State Farm inflicted on the Campbells. We can, however, find ample grounds to defend an award of punitive damages in the upper range permitted by due process based on our concern that State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells. *See Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶¶ 21, 34, 63 P.3d 686 (stating that the chief aggravating factor was "a lack of remorse increasing the

likelihood of recidivism").

¶ 36 Lastly, we consider whether the substantial emotional damages sustained by the Campbells were the result of State Farm's intentional malice, trickery, and deceit. We conclude that the damages sustained by the Campbells were no mere accident. At trial, Ray Summers, the adjuster who handled the Campbell case, testified that State Farm resorted to various tactics to create prejudice in the event the case ever went before a jury. *Campbell I*, 2001 UT 89 at ¶ 29, 65 P.3d 1134. For example, State Farm manager Bob Noxon instructed Summers to manufacture the false story that Todd Ospital, who was killed in the automobile accident for which Mr. Campbell was found to be at fault, was speeding because he was on his way to see a pregnant girlfriend. *Id.* In truth, there was no pregnant girlfriend, nor was Mr. Ospital even speeding; this story was invented only to cause prejudice in the record. *Id.* This deceitful conduct can only be explained as part of a scheme to reduce State Farm's economic exposure. The possibility that its dissembling would expose the Campbells to an excess judgment must have been apparent to State Farm. To react as it did when the excess judgment became a reality only confirms the toxicity of State Farm's behavior.

B. Ratio of Compensatory Damages to Punitive Damages

¶ 37 We turn now to the second *Gore* guidepost: the ratio between actual and punitive damages awarded. State Farm focuses its attention on the Supreme Court's statement that "[w]hen compensatory damages are substantial, then a lesser ratio [of compensatory to punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell II*, 538 U.S. at 425. The compensatory damages award to the Campbells was substantial and, in the Supreme Court's view, provided them "complete compensation." *Id.* at 426. This is due at least in part to the possibility, recognized by the Supreme Court, that the compensatory damages award for emotional distress

incorporated within it a punitive component.[7] *Id.*

¶ 38 Such a conclusion, though plausible as an abstract proposition, does not account for the circumstances of the compensatory damages award in this case. The jury awarded the Campbells $2.6 million in compensatory damages. The trial court granted State Farm's motion for remittitur and reduced the award to $1 million: $600,000 for Mr. Campbell and $400,000 for Mrs. Campbell. The trial court's ruling was supported by extensive and detailed findings explaining the basis for the reduced compensatory damages award. Based on this thorough record, we conclude that the trial court's compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages. We are convinced that the combined efforts of the jury and the trial judge ensured that the compensatory damages award was what it purported to be: compensation based on considered evaluation of the degree of emotional harm inflicted on the Campbells by State Farm. Because it is exclusively for actual harm sustained by the Campbells, the compensatory damages award supports a punitive damages award exceeding $1 million.

¶ 39 In its discussion of the relationship between compensatory and punitive damages, the Supreme Court reaffirmed that ratios exceeding single- digits, which it strongly implied mark the outer limits of due process, may be appropriate only where " 'a particularly egregious act has resulted in only a small amount of economic damages,' " or where " 'the monetary value of noneconomic harm may have been difficult to determine.' " *Id.* at 425 (quoting *Gore*, 518 U.S. at 582). These circumstances are not present here. But, neither is this a proper case to limit a punitive damages award to the amount of compensatory damages. The 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compen-

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[7] *Campbell II*, 538 U.S. at 426 (" 'In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.' ") (quoting Restatement (Second) of Torts § 908, cmt. c (1977)).

satory damages award for economic injury is coupled with conduct of unremarkable reprehensibility. This scenario, likewise, does not describe this case.

¶ 40 Here, the Campbells were awarded substantial noneconomic damages for emotional distress. As the Supreme Court noted, "Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major rule of punitive damages to condemn such conduct." *Id.* at 426. The trial court valued the extent of the Campbells' injury at $1 million. We have no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm. Furthermore, such conduct is a candidate for the imposition of punitive damages in excess of a 1-to-1 ratio to compensatory damages. Simply put, the trial court's determination that State Farm caused the Campbells $1 million of emotional distress warrants condemnation in the upper single-digit ratio range rather than the 1-to-1 ratio urged by State Farm.

¶ 41 When considered in light of all of the *Gore* reprehensibility factors, we conclude that a 9-to-1 ratio between compensatory and punitive damages, yielding a $9,018,780.75 punitive damages award, serves Utah's legitimate goals of deterrence and retribution within the limits of due process.

C. Comparable Civil and Criminal Penalties

¶ 42 The application of *Gore's* final guidepost, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, to State Farm's conduct does not cause us to retreat from our determination that a punitive damages award nine times greater than the compensatory damages is called for here.

¶ 43 In *Campbell II*, the Supreme Court pointed to a potential $10,000 fine for fraud as "the most relevant civil sanction" to which State Farm was exposed for its conduct toward the

Campbells.[8] 538 U.S. at 428; *see also* Utah Code Ann. § 31A-26-303 (2003). According to the Supreme Court, this fine was "dwarfed" by the $145 million punitive damages jury award. *Id.* It is unclear, however, what amount of punitive damages would be supported by a $10,000 fine. The Supreme Court endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine. Presumably, then, this 100-to-1 ratio does not offend due process. Thus, somewhere between $1 million and $145 million, the difference between the $10,000 civil penalty and the punitive damages award becomes so great that the latter "dwarfs" the former. State Farm claims in its brief that the Supreme Court impliedly found that the civil penalty would be dwarfed by a $17 million punitive damages award. Whether or not this is true, we hold fast to our conviction that a punitive damages award of $9,018,780.75 is in line with the third *Gore* guidepost.

¶ 44 The nature of a civil or criminal penalty provides some useful guidance to courts when fixing punitive damages because it reflects "legislative judgments concerning appropriate sanctions for the conduct at issue." *Browning-Ferris*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part). However, the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic. For example, while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes. Utah Code Ann. § 76-3-301 (2003).

¶ 45 The Campbells invite us to conduct anew an analysis of the potential penalties to which State Farm may be exposed,

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[8] The Campbells also invite us to consider the possibility that State Farm's license to underwrite insurance in Utah could be revoked for failure to meet good faith requirements. We do not need to develop this argument in its entirety in order to support our punitive damages award. However, we recognize that State Farm's behavior, particularly if it were to become a pattern in Utah, may indeed be justification for termination of its license, a penalty that surely would cost it more than $10,000.

based on the narrowed range of conduct deemed relevant by the Supreme Court. While we agree that the Supreme Court opened the door to such a reassessment, we believe that it is unnecessary in light of our conclusion that $9,018,780.75 is amply supported by the $10,000 civil penalty.

¶ 46 In sum, the Supreme Court affirmed the authority of a state to "make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *Campbell II*, 538 U.S. at 422 (citing *Gore*, 517 U.S. at 569). It follows, therefore, that each state retains the right and the responsibility to draw on its own values and traditions when assessing the reprehensibility of tortious conduct for the purpose of reviewing the propriety of a punitive damages award, so long as that review conforms to the *Gore* guidelines and the demands of due process. To the extent that our conclusions about what size punitive damages award best serves the legitimate interests of Utah exceeds an award suggested by the Supreme Court, we are exercising what we interpret to be a clear grant of discretion to do so. We have carefully considered the scope of the Supreme Court's mandate and have endeavored scrupulously to confine ourselves to it.

V. ATTORNEY FEES, EXCESS VERDICT, AND SPECIAL DAMAGES

¶ 47 Finally, we turn to the Campbells' claim that costs and attorney fees incurred in this action, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in calculating a ratio between compensatory and punitive damages. We disagree.

¶ 48 We believe that fairly read, the Supreme Court's opinion forecloses consideration of a compensatory damages number other than the $1,000,000 awarded by the jury. The Supreme Court's analysis of the reasonableness and proportionality of the punitive damages award was grounded in its conviction "that there is a presumption against an award that has a 145-to-1 ratio." *Campbell II*, 538 U.S. at 426. While that analysis may not have been different had the denominator been $1,939,518.10 (the amount of the compensatory damages, special damages, excess verdict, and attorney fees combined), and the ratio thereby reduced to 75-to-1, the considerable

attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator. We do, however, include the award of special damages as part of our punitive damages award as both parties agree it is part of the overall damages assessment.

¶ 49 To consider attorney fees and expenses in awarding punitive damages also invites unnecessary conceptual and practical complications to an already complex enterprise. In almost every case, including this one, the attorney fees and expense damage component would require its own independent reprehensibility assessment using the *Gore* standards. The manner in which a defendant conducts litigation bears a rational relationship to the conduct giving rise to the claim for punitive damages and would inevitably lead to an unseemly and time-consuming appendage to the trial.

¶ 50 The incorporation of attorney fees and expenses into the compensatory damages award would substantially alter the manner in which trials are conducted in this state. Under our general practice, the issues of whether attorney fees are available to a party and the reasonableness of the requested fees are reserved for determination by the judge after the conclusion of the trial or other proceedings. *Meadowbrook, LLC v. Flower*, 959 P.2d 115, 117-18 (Utah 1998). We have little doubt that the interests of justice would be subverted by sidetracking the focus of a trial away from the central claims of the parties and onto issues relating to attorney fees and expenses. *Id.*

VI. CONCLUSION

¶ 51 In conclusion, we hold that State Farm's behavior toward the Campbells was so egregious as to warrant a punitive damages award of $9,018,780.75, an amount nine times greater than the amount of compensatory and special damages.

¶ 52 Chief Justice Durham, Justice Wilkins, Justice Parrish, and Judge Billings concur in Justice Nehring's opinion.

¶ 53 Having disqualified himself, Associate Chief Justice Durrant does not participate herein; Utah Court of Appeals Judge Judith Billings sat.

Supreme Court U.S.
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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INS. CO.,
Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK,
SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE
OF THE ESTATE OF CURTIS B. CAMPBELL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether this Court should grant review to consider the Utah Supreme Court's factbound application of the guideposts prescribed by this Court *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and explicated in the circumstances of this very case only one Term ago in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Inez Preece Campbell and Matthew C. Barneck, Special Administrator and Personal Representative of the Estate of Curtis B. Campbell, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed in this case.

This case involves a punitive award against State Farm for its fraudulent and bad faith conduct in handling a third-party insurance claim. Just one Term ago, this Court reviewed this case on the merits and held that the Utah courts could not consider State Farm's nationwide claims-processing policies in determining the size of a punitive award needed to fulfill Utah's legitimate interests in deterrence and punishment. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This Court vacated the $145 million punitive award and instructed the Utah Supreme Court on remand to apply the guideposts prescribed in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) – not with reference to State Farm's nationwide policies, but only with regard to State Farm's conduct in Utah that bore relation to the harm suffered by the Campbells. The Utah Supreme Court did exactly that in recalculating the award in accordance with this Court's mandate and entering an award of approximately $9 million.

The Petition makes two principal points. First, it repeatedly accuses the Utah court of "repudiat[ing] specific findings by this Court" and of "refus[ing] to follow the mandate of this Court." Pet. 6, 28. Those charges are unfounded and unfair. They rest on State Farm's mischaracterizations of the Utah Supreme Court's opinion. In fact, the Utah Supreme Court faithfully followed this Court's mandate and did not consider any out-of-state conduct by State Farm in assessing the punitive award in this case.

Second, the Petition seeks to re-argue the Utah court's factual findings. Even if there were merit to the Petition's arguments – and there is not – there would be no reason for this Court to grant certiorari to decide the factbound questions presented by State Farm. The Petition is a textbook example of a factbound challenge to a lower court's application of a settled legal principle. The Petition should be denied.

STATEMENT OF THE CASE

1. The Initial State Proceedings. In 1981, Curtis Campbell was responsible for an automobile accident that disabled Robert Slusher and killed Todd Ospital. At the time, Mr. Campbell was insured by State Farm up to $25,000. As this Court found, "[e]arly investigations did support differing conclusions as to who caused the accident, but 'a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash.'" 538 U.S. at 413 (quoting the opinion of the Utah Supreme Court).

Nonetheless, State Farm chose not to settle the case. As this Court observed, State Farm "ignored the advice of one of its own investigators and took the case to trial, assuring the Campbells that 'their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel.'" *Id.* (quoting the opinion of the Utah Supreme Court).

At trial, Mr. Campbell was found 100 percent responsible and a judgment was entered against him for $135,849. State Farm refused to pay this amount, suggesting instead that the Campbells put their house up for sale to pay off the judgment. State Farm's counsel told the Campbells: "'You may want to put for sale signs on your property to get things moving.'" *Id.* "Nor was State Farm willing to post a supersedeas bond to allow Campbell to appeal the judgment

against him. Campbell obtained his own counsel to appeal the verdict." *Id.*

During the pendency of the appeal, in late 1984, Slusher, Ospital, and the Campbells reached an agreement whereby Slusher and Ospital agreed not to seek satisfaction of their claims against the Campbells. In exchange, the Campbells agreed to pursue a bad faith action against State Farm. *Id.* The Utah Supreme Court affirmed the judgment against Campbell. *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989). State Farm ultimately paid the entire judgment.

The Campbells filed a complaint against State Farm alleging bad faith, fraud, and intentional infliction of emotional distress. At trial, the Campbells were permitted to introduce evidence regarding State Farm's nationwide claims-processing policies. *See* 538 U.S. at 415 (quoting the opinion of the Utah Supreme Court).

The jury awarded the Campbells $2,086.75 in special damages, $2.6 million in compensatory damages, and $145 million in punitive damages. The trial judge remitted this amount to $1 million in compensatory damages and $25 million in punitive damages. On appeal, the Utah Supreme Court reinstated the original jury verdict of $145 million in punitive damages, relying on the evidence of State Farm's nationwide claims-processing policies.

2. This Court's Decision. On plenary review, this Court vacated the punitive award and remanded the case to the Utah Supreme Court. This Court's holding rested on the legal conclusion that the Utah court erred in considering State Farm's nationwide policies as a basis for punitive damages. This Court found that the evidence "concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company." 538 U.S. at 415. "This case . . . was used as a platform to expose, and punish, the perceived deficiencies of State

Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct[ed] toward the Campbells." *Id.* at 420.

This Court therefore concluded that the Utah Supreme Court's reinstatement of the $145 million punitive award was legal error. However, this Court did not exonerate State Farm. To the contrary, this Court found that State Farm's conduct was "reprehensible," *id.* at 419, and it reiterated many of the factual findings made by the Utah courts. *Id.* This Court suggested that, while State Farm's misconduct could not justify a $145 million award, it could nonetheless justify a "more modest" award of punitive damages: "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id.* at 419-20.

This Court opined that "[o]ur jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (citation omitted).

This Court commented that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429. However, this Court did not purport to calculate the maximum award that the

Constitution would permit on this record. Rather, the Court expressly left that task to the Utah Supreme Court on remand: "The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts." *Id.* "[T]he case is remanded for proceedings not inconsistent with this opinion." *Id.*

3. The Utah Supreme Court's Decision. On remand, State Farm argued that the appropriate punitive damages award was $1,002,086.75. The Campbells sought $17,455,663.00. The Utah Supreme Court rejected the arguments of both parties, recomputed the punitive award under the legal standard prescribed by this Court, and entered a punitive award of $9,018,780.75. The Utah Supreme Court's decision was unanimous and included the votes of two new members not on the original panel.

The Utah Supreme Court began by making clear that its "duty in the face of a remand order demands unwavering fidelity to the letter and spirit of the mandate." A.2a. "We take seriously the Supreme Court's direction that 'the proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts.'" *Id.* "[W]e must properly identify and apply the Supreme Court's principles announced in *Campbell II*." A.4a.

The Utah Supreme Court declined to consider any out-of-state evidence concerning State Farm's nationwide claims-processing policies in assessing punitive damages. A.5a-6a. Therefore, the Utah Supreme Court carefully limited its focus to State Farm's in-state conduct that bore relation to the harms suffered by the Campbells. A.6a. The Utah court heeded this Court's observation that punitive awards bearing a single-digit ratio with compensatory damages are more likely to satisfy due process. A.15a. The Utah court held that "State Farm's behavior toward the Campbells was so egregious as to warrant a punitive

damages award of $9,018,780.75, an amount nine times greater than the amount of compensatory and special damages." A.19a.

The Utah Supreme Court issued a measured, balanced opinion that rejected the Campbell's requested damages and ruled in State Farm's favor in an important respect with respect to the ratio guidepost. On remand, the Campbells argued that the total "compensable harm" for ratio purposes should be treated as $1,939,518.10 (meaning that the relevant ratio in this case would be calculated not as 9:1 but as approximately 4.6:1). On the basis of *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 449 (1993), the Campbells contended that costs and attorney fees, as well as the excess portion of the verdict not covered by insurance, should be included as part of the denominator in computing the ratio between compensatory and punitive damages. But the Utah Supreme Court rejected the Campbells' argument on the ground that it was foreclosed by this Court's opinion in *Campbell*. A.18a. Thus, the Utah Supreme Court strove to honor this Court's mandate and refused to accept the arguments of either party that it believed departed from that mandate.

REASONS FOR DENYING THE WRIT

In *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) ("*Campbell*"), this Court vacated the previous punitive damage award in this case because "[t]he Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct[ed] toward the Campbells." *Id.* at 420. This Court did not have the benefit of the Utah courts' view of the proper punitive award based solely on State Farm's conduct in Utah with respect to the Campbells. Accordingly, this Court corrected the Utah courts' erroneous consideration of nationwide claims-processing policies and instructed the Utah Supreme Court to undertake "[t]he proper calculation of punitive damages under the principles we have

discussed." *Id.* at 429. On remand, the Utah court recalculated the award "based solely on [State Farm's] behavior that affected the Campbells and took place within Utah." A.6a. The Utah Supreme Court properly applied the legal standard this Court outlined, and there is no reason for this Court to review its judgment.

State Farm disagrees with the Utah Supreme Court's factual findings. The Petition repeatedly seeks to re-argue the evidence in this case. *See, e.g.*, Pet. 10 (arguing about what inferences "the record" permits); *id.* at 11 (Utah court's finding "inconsistent with" "the record in this case"); *id.* at 12 ("the record does not support" Utah court's finding); *id.* at 12-13 (recounting trial testimony at length); *id.* at 14 ("[t]he record in this case" allegedly shows no need for deterrence); *id.* at 14 n.7 ("unrebutted testimony of State Farm's regional vice president" allegedly undermines Utah courts' findings); *id.* at 15 (Utah courts' findings allegedly wrong "[i]n view of the record").

State Farm impermissibly asks this Court to sit as fact-finder to second-guess the factual determinations of the lower courts. The Petition dredges up inadmissible and uncorroborated hearsay. *E.g., id.* at 16 n.8. The Petition relies on evidence that was not before the jury or trial court. *Id.* at 15 n.7, 16 n.8. The Petition goes so far as to dispute *this Court's* previous finding that State Farm told the Campbells to put a for-sale sign on their house. *Compare* Pet. 13 n.6 *with* 538 U.S. at 419.

State Farm's description of the record in this case is not accurate. More to the point, however, State Farm's attempt to retry the facts of the case demonstrates the Petition's lack of merit. This Court's scarce resources and distinctive capacities are not sensibly devoted to a fact-finding mission of the sort State Farm evidently contemplates. Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly

stated rule of law." This Petition, which ignores Rule 10, is a classic attempt to challenge a lower court's factbound application of a settled legal rule.

Nor would granting the Petition provide any appreciable assistance to the lower courts. This Court has already provided ample guidance regarding the due process factors that govern punitive damage awards. Just one Term ago, this Court issued its decision in *Campbell* explicating the constitutional factors previously announced in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). There is no reason to review the punitive award in this case yet again. The lower courts are still absorbing this Court's decision only one Term ago vacating the initial punitive award in this very case. After the *BMW* decision, this Court waited six years for the lower courts to sort out the implications of that decision, before granting certiorari in *Campbell*. Further percolation in the lower courts would enable this Court to decide what additional guidance, if any, is appropriate. It is much too soon for this Court to revisit ground so recently tilled. The Petition should be denied.

I. THE UTAH SUPREME COURT PROPERLY FOLLOWED THIS COURT'S MANDATE ON REMAND.

On remand, the Utah Supreme Court faithfully followed this Court's mandate. The Petition is demonstrably wrong in asserting that "[t]he Utah Supreme Court flatly refused to honor the spirit and letter of this Court's opinion." Pet. 25. The Utah court made clear that "our duty in the face of a remand order demands unwavering fidelity to the letter and spirit of the mandate." A.2a. "[W]e must properly identify and apply the Supreme Court's principles announced in *Campbell II*." A.4a. The Utah court explained that this Court "narrow[ed] the scope of relevant evidence which we may consider in evaluating the reprehensibility of State Farm's conduct, and . . . provid[ed] more detailed guidance for determining the relationship between compensatory and

punitive damages." A.5a. "We have carefully considered the scope of the Supreme Court's mandate and have endeavored scrupulously to confine ourselves to it." A.18a.

The primary focus of this Court's opinion in *Campbell* was the Utah court's improper consideration of extraterritorial evidence. On remand, the Utah Supreme Court recomputed the award without reference to State Farm's nationwide claims-processing policies. Instead, the court limited its focus to State Farm's in-state conduct that bore relation to the harms suffered by the Campbells. A.6a ("We are mindful that it was our consideration of irrelevant extra-territorial evidence concerning reprehensibility which attracted most of the Supreme Court's criticism in *Campbell II*. We therefore reevaluate State Farm's conduct based solely on its behavior that affected the Campbells and took place within Utah."). In imposing a punitive award that was nine times the amount of compensatory damages, the Utah court heeded this Court's admonition that punitive awards bearing a single-digit ratio with compensatory damages are more likely to satisfy the *BMW* guideposts as a matter of due process. 538 U.S. at 425.

State Farm focuses on this Court's comment in *Campbell* that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. However, the quoted language is a *prediction* ("likely would justify"), not a *holding* or a *directive*.

If this Court had intended to hold in *Campbell* that a 1:1 ratio between punitive and compensatory damages was the constitutional maximum in this case, it would have directed entry of judgment for that amount. Instead, this Court's mandate was completely different. This Court did not purport to calculate the maximum award that the

Constitution would tolerate on this record. Rather, this Court expressly left that task to the Utah Supreme Court on remand: "The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts." *Id.* "[T]he case is remanded for proceedings not inconsistent with this opinion." *Id.* Further, this Court twice underscored the "discretion" that states possess "over the imposition of punitive damages," within the constraints of due process. *Campbell*, 538 U.S. at 416, 417 (internal quotation marks omitted).

State Farm improperly seeks to recast the language of the mandate in *Campbell* from that of constrained guidance to that of ministerial directive. State Farm's interpretation conflicts with this Court's customary practice, which is to announce the governing legal *standard* and remand to the appropriate lower court for application of that standard to the facts of the particular case, and not to employ the lower court as a mere calculator or scribe. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), for example, this Court instructed the Alabama Supreme Court to undertake on remand an "independent determination" of an appropriate punitive damages award consistent with the guideposts erected by this Court. *Id.* at 586.

It is therefore most implausible to construe this Court's prior opinion as holding that a 1:1 ratio was the constitutional maximum in this case. Such a construction would be especially implausible in light of the prior proceedings here, for the focus of this Court's *Campbell* opinion was whether the Utah Supreme Court could consider the nationwide scope of State Farm's claims-processing policies, or whether instead the Utah court was required to limit its attention to State Farm's conduct within Utah that "bore . . . relation to the Campbells' harm." 538 U.S. at 422. *That* was the sole legal question on which State Farm sought this Court's review. Pet. in No. 01-1289 at i (award "is based upon the defendant's alleged business practices nationwide

over a twenty year period"). State Farm affirmatively represented that this Court would not need to thoroughly analyze the evidence of this case in order to resolve the question presented. *See, e.g.*, Reply Brief filed April 10, 2002, at 5 ("Plaintiffs attempt to dissuade this Court from granting review by claiming incorrectly that State Farm is asking the Court to conduct a fact-intensive review as to whether the 27,000 page record supports the $145 million punitive damages award by the jury in this case.").

Accordingly, even if this Court *had* examined every page of the voluminous record in this case in deciding *State Farm v. Campbell*, it would have done so through an aperture that posed one particular question: whether State Farm's nationwide conduct could properly be considered in justifying a $145 million award. This Court never asked the question necessarily posed by State Farm's latest petition: what would be the highest allowable award upon considering only State Farm's conduct that (a) occurred in Utah and (b) relates to the harm suffered by the Campbells? This Court left that question for the Utah court to resolve in the first instance.

II. THE UTAH SUPREME COURT'S ANALYSIS OF REPREHENSIBILITY IS CONSISTENT WITH THIS COURT'S OPINION.

A. The Utah Supreme Court Properly Followed This Court's Mandate.

The Utah Supreme Court explained that, in assessing reprehensibility, it would "reevaluate State Farm's conduct based solely on its behavior that affected the Campbells and took place within Utah." A.6a. The Utah court concluded that, under this standard, State Farm's misconduct was highly reprehensible. A.8a-14a.

That conclusion, and the subsidiary factual findings that composed it, are completely consistent with this Court's

mandate. In fact, this Court specifically found that State Farm's conduct was "reprehensible" (538 U.S. at 419) and re-affirmed many of the findings of the Utah courts. This Court noted, for instance, that "[t]he trial court found that State Farm's employees altered the company's records to make Campbell appear less culpable. State Farm disregarded the overwhelming likelihood of liability and the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded. State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house." 538 U.S. at 419. This Court opined that, while such misconduct could not justify a $145 million award, it was nothing short of "reprehensible" and could certainly justify punitive damages: "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment *for this reprehensible conduct* could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id.* (emphasis added). Thus, this Court invited the Utah courts to calculate a "more modest" punishment than the original $145 million judgment. On remand, the Utah Supreme Court did exactly that.

B. There Is No Merit To State Farm's Criticisms of the Utah Supreme Court's Application of the Governing Legal Standard To This Record.

The Petition argues that the Utah Supreme Court misapplied the reprehensibility guideposts in a number of respects. None of State Farm's arguments has merit. In any event, State Farm's objections are obviously so fact-specific that they present no question warranting certiorari.

1. Whether the harm was economic or physical.

State Farm accuses the Utah Supreme Court of "directly contradict[ing] this Court's analysis" as to whether

the Campbell's harm was economic or physical. Pet. 9. To the contrary: the Utah Supreme Court expressly stated that "[w]e are mindful of the Supreme Court's observation that 'the harm [in this case] *arose from a transaction in the economic realm*, not from some physical assault or trauma.'" A.9a (quoting 538 U.S. at 426) (emphasis added). Tellingly, this Court did *not* opine that the Campbells' injury as disclosed by this record was purely "economic." It bears repeating that this Court stated only that the injury "arose from a transaction in the economic realm," 538 U.S. at 426, as indeed it did. The Utah Supreme Court's recognition that the harm suffered by the Campbells here extended beyond that ordinarily associated with a purely financial misdeed and encompassed the personal anxiety and the emotion-charged risk they faced as a result of State Farm's conduct is therefore entirely consistent with this Court's opinion.

The state court properly found that "the gravity of harm which an insurer may potentially inflict on an insured is unique to the nature of the product and service that insurance provides." A.9a. "Peace of mind clearly plays a central role in accounting for the appeal of liability insurance." A.10a. "When an insurer decides to delay or to deny paying benefits, the policyholder can suffer injury not only to his economic well-being but to his emotional and physical health as well." A.10a (internal quotation marks omitted). Surely State Farm is not asking this Court to grant certiorari in order to upset that factual conclusion.

Emblematic of the Petition's misstatements of the record is State Farm's assertion that, "as the trial court found, the record was devoid of 'objective evidence of emotional or mental distress.'" Pet. 10 (citation omitted). To the contrary, the trial court *denied* State Farm's motion for judgment on the Campbells' claim for intentional infliction of emotional distress, finding that *there was substantial evidence* to support the claim. JA3359a-62a. The trial court opined that "there was ample competent evidence that the Campbells did suffer substantial emotional damages as a proximate result of

State Farm's wrongful conduct." JA3364a. "Many witnesses, including high-ranking State Farm officials, acknowledged at trial that an excess verdict alone (even if never executed on, in the end) would likely cause mental distress and would traumatically affect the insured." JA 3367a. Witnesses described the 65-year-old Campbell as "devastated," "distraught," "tied up in knots" – so "fragile" and "greatly distressed" that they feared that he might suffer another stroke or a heart attack. JA 813a-14a, 821a, 825a-29a, 1586a-87a, 1660a. The Utah Supreme Court properly concluded that the noneconomic dimensions of the injury suffered by the Campbells were "profound." A.12a.

2. Whether the Utah court properly took the insurance context into account in assessing the reprehensibility of State Farm's misconduct.

State Farm relatedly accuses the Utah Supreme Court of unjustifiably "inflat[ing] its estimate of reprehensibility." Pet. 11. The court did no such thing. The court simply recognized the realities of the insurance context. "When an insurer callously betrays the insured's expectation of peace of mind, as State Farm did to the Campbells, its conduct is substantially more reprehensible than, for example, the undisclosed repainting of an automobile which spawned the punitive damages award in *Gore*." A.11a. Plainly, some injuries "arising in" the economic realm are more reprehensible than others. State Farm provides no authority to support its strange claim that all such injuries must be considered without regard to the particular circumstances of the individual case. State Farm does not identify any circuit split on the issue. Nor does it offer any other reason for this Court to review the matter. Even if State Farm's "irrelevance of context" argument had merit, the matter would plainly benefit from further percolation in the lower courts. There is no occasion now for this Court's review.

3. Indifference or reckless disregard for the health and safety of others.

The Utah Supreme Court found that "[t]here is little doubt that State Farm could reasonably have known that its conduct would cause stress and trauma to a policyholder. State Farm was clearly indifferent to this result, evincing a reckless disregard for the Campbells' peace of mind." A.12a. State Farm contends that this factor must be limited to instances of *physical* injury or danger, Pet. 11, but it offers no analysis of why a defendant's culpable indifference to devastating *emotional* injuries must be treated as irrelevant to the reprehensibility guidepost. Nor does State Farm establish any relevant conflict among lower court decisions requiring this Court's intervention. In fact, in *BMW* this Court opined that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, . . . can warrant a substantial penalty." 517 U.S. at 576.

4. Whether the target of the conduct was financially vulnerable.

The Utah Supreme Court found that "not only were the Campbells financially vulnerable, but their vulnerability enabled, if not motivated, State Farm's conduct." A.12a. The trial court specifically found that *"State Farm was aware of the Campbells' vulnerability and fragility, and of the complete trust the Campbells had placed in State Farm and its agents.* State Farm *intentionally* and *fraudulently* betrayed this trust and took advantage of the Campbells' vulnerability." JA 3361a (emphasis added).

On this crucial point, State Farm resorts to re-arguing the record evidence supporting the Utah courts' factual findings. Pet. 12-13. Plainly, however, this Court does not sit as a factfinder to second-guess factual determinations made by the lower courts. In any event, there was ample record evidence of the Campbells' vulnerability and of how State Farm exploited that vulnerability. "At the time of State

Farm's wrongful conduct, the Campbells were elderly and Mr. Campbell has residuary effects from a stroke and Parkinson's disease." JA 3360a. "The Campbells were economically vulnerable, having suffered previous financial setbacks and having meager financial resources." *Id.* "Mr. Campbell had previously experienced severe emotional trauma, including the murder of his first wife, the desertion of his second wife after his stroke, and the death of his third wife from cancer less than two years after their marriage. Mrs. Campbell had gone through a bitter divorce. The Campbells' home had previously gone into foreclosure and one of their cars had been repossessed due to the wrongful actions of Mrs. Campbell's ex-husband." JA 3361a. "The Campbells were quiet, unassuming, and trusting individuals." JA 3366a.

State Farm argues that this Court has somehow already rejected the Utah courts' findings regarding the Campbells' vulnerability simply because "[t]his Court in its opinion did not address this factor" as part of its "reprehensibility analysis." Pet. 12. But even if such silence could constitute an implicit finding, the fact is that this Court *did* address the Campbells' vulnerability when it reiterated the Utah courts' finding that "State Farm amplified the harm by at first assuring the Campbells their assets would be safe from any verdict and by later telling them, postjudgment, to put a for-sale sign on their house." 538 U.S. at 419. The Utah Supreme Court pointed to this very episode as support for its finding that State Farm exploited the Campbells' vulnerability: "It is difficult to imagine State Farm making this statement to a sophisticated insured whom State Farm believed to have the wherewithal to protect himself from its predations." A.12a.

That this Court in its prior opinion did not engage in a more elaborate analysis of the Campbells' vulnerability only goes to show that this Court focused on correcting the Utah courts' erroneous consideration of State Farm's nationwide claims-processing policies, not on the proper punitive award

based solely on State Farm's conduct in Utah. Now that the Utah Supreme Court on remand has manifestly applied the proper legal standard, there is no reason to review its factbound judgment.

5. Need to deter repetition.

The Utah court found that "State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." A.13a. State Farm accuses the Utah Supreme Court of "subverting" this Court's opinion. Pet. 14. But the Utah Supreme Court did no such thing. It explained that "the Supreme Court expressly found that we erred in determining that State Farm was a recidivist" and that "we are bound by the Supreme Court's finding that State Farm was not a recidivist." A.13a. The Utah court focused not on recidivism but on State Farm's propensity to commit further misconduct in the future – a matter that is separate from (and not foreclosed by) this Court's finding that State Farm was, at the time of trial, not a recidivist. The Utah Supreme Court explained that "[w]e will not and, consistent with our duty on remand, cannot invoke deterrence as a justification for punitive damages based on conduct dissimilar to that which State Farm inflicted on the Campbells. We can, however, find ample grounds to defend an award of punitive damages in the upper range permitted by due process based on our concern that *State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells*." A.13a (emphasis added). The Utah court's approach is entirely consistent with this Court's opinion and also amply supported by the record. *See* Part II-B-6, *infra*.

State Farm argues that there were no "similar subsequent bad acts" in Utah after its mistreatment of the Campbells. Pet. 14. But State Farm misstates the evidence, and in any event its argument does not undermine the Utah Supreme Court's finding of propensity for future misconduct.

At trial, State Farm was forced to acknowledge there were at least seven excess verdict third-party cases in Utah between 1978 and 1995, JA 288a-89a, and was unable to refute the proof that this figure is likely to be a dramatic understatement. Because State Farm deliberately stopped tracking adverse verdicts in the mid-1970s as a defensive measure, 65 P.3d at 1147 (¶ 26), 1148 (¶ 30); JA 1346a-50a; JA 1412a-18a, its estimate at trial was indisputably little more than a conservative guess. To arrive at the figure of seven excess verdict cases, a State Farm official did nothing more than make phone calls to various company employees and defense counsel in Utah, asking if they happened to remember any excess verdicts involving State Farm insureds. JA 287a-89a. And this figure was reached only after a court-ordered recount. In the initial count, State Farm's sworn discovery response was that its Utah management knew of *no* other excess verdicts. R. 10270:134-35; R. 10285:205-07. Not surprisingly, State Farm's own statistical expert said, "I would have a tendency to be afraid of that data." R. 10283:204. In observing that "[t]he Campbells have identified scant evidence of repeated misconduct of the sort that injured them," 538 U.S. at 423, this Court did not "find," contrary to the record at least as understood below, that the Campbells' was the only State Farm excess verdict third-party case in Utah.

State Farm also relies on supposed "state of mind" letters that it sought to submit after the trial in this case. Pet. 15 n.7. The trial court ruled that these letters were "not in the trial record" and were "stricken from the record," and State Farm did not appeal. R. 10292, 10090-91, 10213-15. On rehearing in the Utah Supreme Court, State Farm appended alleged "state of mind" letters to its petition, without any affidavit attesting that they had actually been sent or any identification of recipients. The Utah Supreme Court denied rehearing without making the letters part of the record or even mentioning them. In 1996 and 1997, State Farm flatly denied the existence of any "peace of mind" policy in two

cases. R. 9179-80, 9190-9203 (attorney affidavit). In 1998, State Farm failed to send any "peace of mind" letter in yet another case. Campbells' Obj. to Rehearing Pet. in Utah S. Ct. at 5 & Exh. 2. By 1999, according to two Utah attorneys formerly employed at the company, State Farm had "revok[ed]" any "policy of sending 'peace of mind' letters." *Id.* at 5 & Exh. 1, ¶ 25(e).

6. State Farm's lack of remorse.

A related point arises in connection with the Utah Supreme Court finding that State Farm "has not voiced so much as a whisper of apology or remorse" and has not "forsworn the conduct that caused the Campbells' injury." A.12. State Farm complains that, by referring to its lack of remorse, the Utah court punished it impermissibly for its "appellate briefing." Pet. 23. This complaint is baseless.

The Utah Supreme Court did not ground the punitive award on State Farm's decision to appeal the verdict. Rather, it grounded that award on State Farm's conduct toward the Campbells and on the fact that State Farm exhibited no contrition or other sign that it would modify its conduct in the future. The Utah court pointed to trial testimony, not simply to appellate briefing, to make that point. A.12a-13a. The finding of lack of remorse was supported not merely by testimony that State Farm was "proud" of the way it treated the Campbells (contra Pet. 24 n.12), but also by the testimony of a State Farm claims adjuster that he had not seen anything in State Farm's conduct relating to the Campbells that violated State Farm guidelines or policies, JA 2712a; by testimony that State Farm subsequently failed to instruct its employees not to engage in the offending conduct, JA 2454a; and by testimony that State Farm failed to discipline any employee. JA 2455a. In *BMW*, this Court indicated that whether a defendant has taken corrective action can be "significant" in assessing a punitive award. 517 U.S. at 579 & n.31. Here, by contrast, State Farm showed no contrition or willingness to reform.

Clearly, State Farm could have exhibited contrition completely outside the courtroom while continuing to press its constitutional objections in court and on appeal with undiluted vigor. In any event, courts routinely draw adverse inferences from parties' judicial submissions (or from gaps in those submissions), with no suggestion that they are "penalizing" the party for its use of the judicial process. *E.g.*, Fed. R. Evid. 801(d)(2)(D) (attorney's oral or written statements may be admissible against client).

State Farm's "remorse" argument, if taken seriously, would invalidate the "acceptance of responsibility" provision of the Sentencing Guidelines, under which a defendant who fails to show remorse will receive a longer sentence than one who does. U.S.S.G. § 3E1.1. Courts have uniformly rejected due process challenges to this provision, and to the consideration of remorse in sentencing generally, on the obvious ground that "acceptance of responsibility for illegal conduct is a routine and unexceptionable feature even of criminal, let alone of civil, punishment. The criminal who in the teeth of the evidence insists that he is innocent, that indeed not the victims of his crime but he himself is the injured party, demonstrates by his obduracy the likelihood that he will repeat his crime, and this justifies the imposition of a harsher penalty on him." *SEC v. Lipson*, 278 F.3d 656, 664 (7th Cir. 2002) (Posner, J.). Precisely that analysis disposes fully of State Farm's argument.

State Farm claims a conflict in this connection with two decisions by intermediate appellate courts in California (notably, not by the California Supreme Court). Pet. 22. But there is no conflict. Unlike the parties in those cases, State Farm was *not* punished for its "trial tactics and litigation conduct" (*id.*); it was punished in view of the likelihood that it would repeat its misconduct in the future. The remaining cases cited in the Petition (at 22) prove the opposite of what State Farm asserts; they show that, even if punitive damages are imposed based in part on a defendant's litigating strategy (which was not the case here), such damages have nothing to

do with penalizing the right to a defense. Rather, they compensate for the under-deterrence caused by such a defendant's efforts "to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case." *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.). *See also Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 421 (Pa. Super. Ct. 2004) ("an extremely aggressive defense . . . in turn can prove very costly to a plaintiff and potentially deter it from pursuing the matter"). There is no lower court conflict and no reason for this Court's review.

7. Intentional trickery or malice.

The Utah Supreme Court properly found that "the substantial emotional damages sustained by the Campbells" were "no mere accident" but instead were the result of State Farm's intentional malice, trickery, and deceit. A.14a. In its special verdict, the jury found for the Campbells on their fraud claim, and the Utah Supreme Court held that the fraud claim provided "an independent basis" for the verdict. 65 P.3d at 1166 (¶ 113). The finding of fraud, and the finding that the verdict could independently rest on fraud, are both amply supported by the record. This Court expressly noted with apparent approval the trial court's finding that "State Farm's employees altered the company's records to make Campbell appear less culpable." 538 U.S. at 419. "For example, State Farm manager Bob Noxon instructed Summers to manufacture the false story that Todd Ospital, who was killed in the automobile accident for which Mr. Campbell was found to be at fault, was speeding because he was on his way to see a pregnant girlfriend. In truth, there was no pregnant girlfriend, nor was Mr. Ospital even speeding; this story was invented only to cause prejudice in the record. This deceitful conduct can only be explained as part of a scheme to reduce State Farm's economic exposure." A.14a. (State Farm's attempt to excuse its misconduct relies on uncorroborated hearsay deposition testimony from a State Farm employee known to have repeatedly placed false

information in files. R. 10268, 10275, 10281, 10284. The deposition was not presented to the jury or trial court. Pet. 16 n.8). The record also makes clear that, while this case was pending, State Farm held a meeting in Utah at which in-house counsel instructed Utah claims managers "to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation." Trial ct. opinion 8/3/98 ¶ 55. The record overwhelming supports the Utah Supreme Court's finding of intentional trickery and malice.

8. State "values and traditions."

State Farm argues that the Utah Supreme Court's reference to "Utah's values and traditions" (A.7) represents a violation of federal due process. Pet. 16-20. That argument is wide of the mark. The remark simply underscored the seriousness with which the court viewed State Farm's misconduct. This Court's own opinion in *Campbell* reveals that punitive damages jurisprudence has not erased Our Federalism in the manner that State Farm suggests. "A basic principle of federalism is that . . . each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." 538 U.S. at 422. "The States need not, and in fact do not, provide such protection in a uniform manner." *Id.* (internal quotation marks omitted). This Court thus reaffirmed the states' autonomy to make policy choices about the relative reprehensibility of conduct within their own respective borders.

State Farm acknowledges that a state's *legislative enactments* may serve as an appropriate source of state "values and traditions," but it maintains that *state courts* cannot be permitted to invoke "values and traditions" on their own. Pet. 18-19. State Farm has evidently confused the reprehensibility guidepost with the legislative penalties guidepost of *BMW*. The latter is by definition tethered to state legislative enactments. But this Court has never

suggested that, in assessing reprehensibility, state courts are limited to considering state statutes. *E.g., BMW*, 517 U.S. at 585 ("we of course accept the Alabama *courts*' view" regarding "the state interest in protecting its citizens from deceptive trade practices") (emphasis added). Indeed, the day has long passed when the Constitution was thought to distinguish the law made by state judges from that made by state legislators. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948). It is a corollary that federal law has precious little to say on the degree to which a state makes its law through its courts or through its legislature. *See Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 480-81 (1981) (Stevens, J., dissenting).

State Farm's argument that including judge-made factors in the reprehensibility analysis "produces an ad hoc, subjective inquiry" (Pet. 19) is flatly foreclosed by this Court's precedents. *See TXO*, 509 U.S. at 465-66 (plurality opinion) (common law rule satisfied notice component of due process); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (judge-made factors "impose[] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages"). In any event, State Farm fails to establish any circuit conflict on the issue or any need for this Court's review.

III. THE UTAH SUPREME COURT'S ANALYSIS OF THE RATIO GUIDEPOST IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION.

In *Campbell*, this Court held that the Utah Supreme Court's prior analysis of the ratio guidepost was flawed because it was premised on out-of-state conduct, as well as on State Farm's wealth and other improper factors. 538 U.S. at 426-27. On remand, the Utah Supreme Court corrected these errors by focusing *solely* on State Farm's conduct with

respect to the Campbells. A.15a. State Farm nonetheless accuses the Utah Supreme Court of "refus[ing] to follow the mandate of this Court" with respect to the ratio guidepost. Pet. 28. State Farm's accusation of bad faith is as groundless as it is insulting.

A. The Utah Court Properly Followed This Court's Mandate.

In *Campbell*, this Court opined that it has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." 538 U.S. at 425. "*We decline again to impose a bright-line ratio* which a punitive damages award cannot exceed." *Id.* (emphasis added). However, the Court's "jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Nonetheless, this Court emphasized that "[t]he precise award in any case, of course, must be based upon *the facts and circumstances of the defendant's conduct* and the harm to the plaintiff." *Id.* (emphasis added).

The Utah Supreme Court faithfully followed this Court's opinion. The Utah court took as a given this Court's admonition that, "'when compensatory damages are substantial, then a lesser ratio [of compensatory to punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" A.14a (quoting 538 U.S. at 425). The Utah court treated itself as bound by this Court's conclusion that the Campbells' compensatory award was "substantial," and did not purport to question this Court's observation that the compensatory damages likely had been based on a component which was duplicated in the punitive award. A.14a.

But that binding general frame of reference did not preclude the Utah Supreme Court's factual determination,

based on "the circumstances of the compensatory damages award *in this case*," that the trial judge's remittitur of compensatory damages ensured that they did *not* in fact contain a punitive element. A.15a (emphasis added). The jury had originally awarded the Campbells $2.6 million in compensatory damages. State Farm argues that this award contained a punitive element. Pet. 26 n.13. But the trial court granted State Farm's motion for remittitur and reduced the award to $1 million: $600,000 for Mr. Campbell and $400,000 for Mrs. Campbell. A.15a. The trial court engaged in an exhaustive review of the evidence in the case and the emotional harm suffered by the Campbells. JA 3364a-68a. The Utah Supreme Court observed that "[t]he trial court's ruling was supported by extensive and detailed findings explaining the basis for the reduced compensatory damages award. Based on this thorough record, we conclude that the trial court's compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages." A.15a.

The Utah Supreme Court's analysis accurately applied the legal framework set forth by this Court to the particular circumstances of this case and this trial record. It is, of course, a question purely of Utah law just what constituted the legally compensable injury to the Campbells in this case, State Farm never having sought review in this Court on any of the components of that definition of compensable injury. Therefore, the question of what "injuries" the award received by the Campbells "compensated" was a matter within the sole purview of the Utah courts.

B. The Utah Supreme Court Properly Concluded That A High Single Digit Ratio Was Appropriate.

The Utah Supreme Court reasonably determined that a high single-digit ratio was warranted in this case because the Campbells suffered significant noneconomic injury in the

form of emotional distress and because State Farm's conduct toward the Campbells was highly reprehensible. A.16a. The Campbells were forced to live in fear of financial ruin for 18 months, which is exactly the kind of hard-to-measure, non-economic harm that this Court has noted would justify a higher ratio than usual. *See Campbell*, 538 U.S. at 425; *BMW*, 517 U.S. at 582. The Utah court's conclusion is completely consistent with this Court's mandate, and State Farm's factbound challenges to that conclusion simply recapitulate arguments already addressed in the context of the reprehensibility guidepost. *See* Part II, *supra*.

IV. THE UTAH SUPREME COURT'S ANALYSIS OF THE LEGISLATIVE PENALTIES GUIDEPOST COMPORTS WITH THIS COURT'S OPINION.

In *Campbell*, this Court held that the Utah Supreme Court's prior analysis of the legislative penalties guidepost was improper because it rested on out-of-state conduct. *See* 538 U.S. at 428 ("here again [the Utah court's] references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct."). On remand, the Utah Supreme Court corrected this error by focusing solely on State Farm's conduct with respect to the Campbells, without considering any out-of-state or dissimilar acts. A.16a-17a.

In *Campbell*, this Court pointed to a potential $10,000 fine for fraud as "the most relevant civil sanction" to which State Farm was exposed for its conduct toward the Campbells. 538 U.S. at 428; *see also* Utah Code Ann. § 31A-26-303 (2003). This Court did not decide the question of State Farm's exposure under the Utah statute – an issue that is purely a matter of Utah law. *See BMW*, 517 U.S. at 577 ("only state courts may authoritatively construe state statutes").

The Utah Supreme Court properly followed this Court's mandate by analyzing the statutory penalty for fraud in relation to this case. The Utah court opined that, "while a

$10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award, it is identical to the maximum fine which may be imposed on a person in Utah for the commission of a first degree felony, the classification assigned our most serious crimes." A.17a (citing Utah Code Ann. § 76-3-301 (2003)). The statutory penalty for fraud faced by State Farm reflects the legislature's determination that the company's misconduct was very serious indeed.

The Utah Supreme Court further noted that, although this Court rejected a $145 million punitive award as excessive, this Court indicated at the same time that what this Court called a "more modest" award, such as $1 million, would be reasonable — notwithstanding the fact that, as the Utah court observed, such an award would be "one hundred times greater than the $10,000 fine." A.17a. "Thus, somewhere between $1 million and $145 million," the Utah Supreme Court properly inferred from this Court's opinion, "the difference between the $10,000 civil penalty and the punitive damages award becomes so great that the latter 'dwarfs' the former." *Id.* As to State Farm's assertion "that [this] Court impliedly found that the civil penalty would be dwarfed by a $17 million punitive damages award," the Utah court rightly refrained from offering any opinion, finding it sufficient to express its "conviction that a punitive damages award of $9,018,780.75 is in line with the third *Gore* guidepost." *Id.* Because the Utah court reached this conclusion, it did not inquire into other potential penalties faced by State Farm, A.18a, although the court made plain its view — as a matter of state law obviously not reviewable by this Court — that "State Farm's behavior," especially given the company's insistence that such behavior was nothing it need feel remorse over and the consequent risk that it might "become a pattern in Utah, may indeed be justification for *termination of its license*, a penalty that surely would cost it more than $10,000." A.17a n.8 (emphasis added).

These findings are fully consistent with this Court's mandate. There is simply no basis for State Farm's assertion that the Utah court "improperly discounted the importance of the comparable penalties" and "disparage[d]" that guidepost. Pet. 29. To the contrary, the Utah court explained that "[t]he nature of a civil or criminal penalty provides some useful guidance to courts when fixing punitive damages because it reflects 'legislative judgments concerning appropriate sanctions for the conduct at issue.'" A.17a (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). The Utah court's observation that "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic," A.17a, far from signaling resistance to this Court's legislative penalties guidepost, merely echoed this Court's parallel observation that "[t]he existence of a criminal penalty does have bearing on the *seriousness* with which a State views the wrongful action. When used to determine the *dollar amount* of the award, however, the criminal penalty has less utility." *Campbell*, 538 U.S. at 428 (emphasis added). The Utah court simply recognized, as did this Court in *Campbell*, that the excessiveness inquiry cannot be reduced to a rote arithmetic calculation.

V. THERE IS NO BASIS FOR SUMMARILY REVERSING THE UTAH SUPREME COURT'S JUDGMENT.

The Petition seeks summary reversal of the Utah Supreme Court's judgment. There is no basis for such a request. Principles of federalism counsel that the judgment of a state's highest court should not be summarily reversed absent exceptional circumstances. Robert L. Stern & Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 323 (8th ed. 2002). That test cannot be met here. The Utah Supreme Court faithfully followed this Court's mandate. State Farm's contrary claim rests on improper second-guessing of the state

court's factual determinations, on the basis of extra-record "non-evidence." *E.g.*, Pet. 15 n.7, 16 n.8. State Farm also tries to convert this Court's *Campbell* decision into a fixed 1:1 ratio rule, which is precisely the opposite of what this Court made plain it was holding — rejecting, as it has repeatedly rejected, any rigid mathematical rule in assessing punitive awards. *See Campbell*, 538 U.S. at 425; *BMW*, 517 U.S. at 582.

This Court's practice supports summary reversal only where a lower court has committed a clear error of law that conflicts with a decision of this Court or other well-established principle. *E.g., City of Los Angeles v. David*, 538 U.S. 715, 716 (2003) (per curiam) ("the Ninth Circuit's holding runs contrary to well-settled principles of constitutional law"); *INS v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) ("well-established principles of administrative law"); *United States v. Bass*, 536 U.S. 862, 863 (2002) (per curiam) (lower court decision "is contrary to [*United States v. Armstrong*, 517 U.S. 456 (1996),] and threatens the 'performance of a core executive constitutional function'") (citation omitted); *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229, 232 (2002) (per curiam) (lower court used improper legal standard to decide recusal issue).

In this case, however, State Farm's argument comes down to the proposition that the Utah Supreme Court erred in finding the pertinent facts revealed by the record in the course of applying the *BMW* guideposts. Even if the Utah court made a factual mistake – which it did not – no such factual error could justify summary reversal. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 513 (2001) (Stevens, J., dissenting) ("factbound determination[s]" inappropriate for summary reversal). Nor has State Farm even attempted to argue that the Utah Supreme Court is an outlier among the lower courts in the way in which it has interpreted this Court's mandate.

In any event, the extensive, 27,000-page record below would make it impossible for this Court to dispose of this case summarily. In the previous *Campbell* proceeding before this Court, the focus was on whether the Utah Supreme Court erred in considering State Farm's nationwide claims-processing policies. The briefing and joint appendix were prepared with that focus in mind. Thus, if this Court were to review the Utah Supreme Court's application of the *BMW* guideposts to this factual record with respect to in-state Utah conduct, the Campbells would clearly be entitled to argue all the law and facts that support a $9 million punitive award on this record — including evidence that was not (because it did not have to be) identified in *Campbell* or included in the joint appendix. *See, e.g.*, Campbells' Opening Br. on Remand in Utah S. Ct. at 12-15 & n.12 (June 9, 2003); Reply Br. 24 & n.13, 27-28 (July 16, 2003). In short, plenary briefing and argument would be unavoidable.

Notably, the Petition does *not* contend that summary reversal in this case would provide any appreciable guidance to the lower courts on punitive damages issues. Nor would such a contention be plausible. For this Court has recognized that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Campbell*, 538 U.S. at 425. "[T]here are no rigid benchmarks that a punitive damages award may not surpass." *Id.* Accordingly, even if this Court were to engage in an exhaustive review of the evidentiary record to decide the reasonableness of the punitive award, the exercise would be of little or no value to lower courts considering different punitive awards based on different factual records. The fact-intensive review urged by the Petition would therefore be a singularly inappropriate use of this Court's necessarily finite resources.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

Plaintiffs' opposition rests upon two fundamentally erroneous propositions: first, that State Farm's petition for certiorari presents "factbound" questions for this Court's determination, and second, that the Utah Supreme Court fully complied with this Court's mandate because that mandate was limited to recalculating the punitive damage award by excluding punishment for out-of-state conduct. Opp. at 1-2. The truth of the matter, however, is that by this petition, State Farm raises important legal, constitutional questions as to whether the Utah Supreme Court correctly applied the due process principles delineated by this Court in this very case, which limit and restrain punitive damages. The pertinent facts need not be "found" by this Court, nor need they be re-analyzed or re-argued; rather they are precisely the same facts that were already before this Court, and noted by this Court, when it wrote its earlier opinion marking the boundaries of constitutionally permissible punishment, not only in general, but in this case specifically. The Utah Supreme Court has looked to those same facts, but re-engineered the analysis to justify a drastic and constitutionally impermissible departure from this Court's guidance.

Ignoring the plain language of this Court's opinion in this case, plaintiffs assert that "[t]his Court never asked the question necessarily posed by State Farm's latest petition: what would be the highest allowable award upon considering only State Farm's conduct that (a) occurred in Utah and (b) relates to the harm suffered by the Campbells?" Opp. at 11. This Court considered and resolved precisely that question, concluding that "[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003). Moreover, this Court's discussion of the constitutional principles relevant to that conclusion and its application of those principles to the factual circumstances of State Farm's conduct toward the Campbells occupies considerably more than half of the Court's analysis of the punitive award in this case. This substantial portion of the Court's

opinion was not, as Plaintiffs termed it before the Utah Supreme Court, "little more than the expression of a judicial hunch" that the Utah Supreme Court was free to disregard.

Plaintiffs emphasize the Utah Supreme Court's protestations of "unwavering fidelity to the letter and spirit" of this Court's mandate. *See* Opp. at 5 (quoting A.2); *see also id.* at 9, 24. In fact, it is difficult to find an opinion by any court that on remand from this Court paid so much lip service to, yet so egregiously disregarded, this Court's guidance, as the Utah Supreme Court's decision. The $9 million punitive damages award now imposed by the Utah Supreme Court is inconsistent with this Court's opinion and is arbitrary and excessive in violation of due process. This Court should grant certiorari to ensure that its mandate is properly carried out in this case. "Further percolation" in the lower courts, as suggested by plaintiffs (Opp. at 8), will be of no benefit if the Utah Supreme Court's misapplication of the constitutional principles governing the due process punitive damages inquiry is allowed to stand. Reversal of the Utah Supreme Court's decision is essential to ensure that this Court's guidance is heeded by the lower courts.

I. The Utah Supreme Court's Reprehensibility Analysis Is Contrary to This Court's Opinion and Mandate

The Utah Supreme Court's overall conclusion as to the reprehensibility of State Farm's conduct towards the Campbells and its subsidiary conclusions as to the application of the five reprehensibility factors are irreconcilably contrary to this Court's opinion and mandate. In its analysis of the reprehensibility guidepost, this Court fully considered and in many instances specifically referenced the factual findings previously made by the Utah courts: *e.g.*, that the lawyer hired by State Farm to defend Mr. Campbell in the original trial of the third-party claims against him purportedly told Mr. Campbell after the verdict to put a "for sale" sign on his house, that State Farm employees testified that they were "proud" of State Farm, that State Farm purportedly manufactured the story that one of the other drivers in the accident was speeding on the way to see his pregnant girlfriend, and so on. *See Campbell*, 538 U.S. at 412-13, 419-20, 426; *see also id.* at 432 (Ginsburg, J., dissenting).

The Utah Supreme Court's hyperbolic and tendentious characterization of the same facts considered by this Court not only is contrary to this Court's reasoned analysis, but has produced an arbitrary and extreme punitive damages award that does not satisfy due process. The issues raised by the Utah Supreme Court's new analysis of reprehensibility are not issues of fact, but are legal issues regarding the proper application of due process principles and proper adherence to the letter and spirit of this Court's mandate.

A. The Utah Supreme Court's Analysis of the Reprehensibility Factors Was Erroneous

Plaintiffs incorrectly argue that the Utah Supreme Court's holding that plaintiffs' harm in this case was "akin to physical assault" (A. 10) can permissibly support that court's conclusion that State Farm's handling of the claims against Mr. Campbell showed extreme reprehensibility. The Utah Court's holding, however, is contrary to the clear import of this Court's evaluation of the harm in this case as involving "no physical injuries" and "ar[ising] from a transaction in the economic realm, not from some physical assault or trauma." *Campbell*, 538 U.S. at 426. Under this Court's analysis, the factual circumstances giving rise to the Campbells' harm pointed to a lesser degree of reprehensibility than harm involving physical assault or injury. The Utah Supreme Court's conclusion that the Campbells' harm was "akin to physical assault" simply cannot be harmonized with this Court's opinion (much less with the facts of this case).

Moreover, in defending the Utah Supreme Court's characterization of the emotional distress in this case as "akin to physical assault," plaintiffs improperly accuse State Farm of misstating the record with regard to the lack of any objective evidence of plaintiffs' emotional distress. Plaintiffs claim that "State Farm's assertion that, 'as the trial court found, the record was devoid of "objective evidence of emotional or mental distress"'" is "emblematic of the Petition's misstatements of the record." *See* Opp. at 13. In fact, the words quoted by State Farm are the words of the trial court itself, which specifically found that there was an "absence in the record of any objective evidence of emotional or mental distress." JA 3364. Thus, there was no evidence that either Mr.

or Mrs. Campbell ever sought or underwent psychiatric or medical treatment for emotional distress, and the Campbells did not have a medical expert testify at trial as to their alleged emotional distress.[1] Courts across the country have long recognized that the objective manifestation of emotional distress is an important safeguard of the genuineness of emotional distress claims. *See, e.g., Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 445 (1997) (Ginsburg, J., concurring in part, dissenting in part); Restatement (Second) of Torts § 436A (1965). Thus, the trial court's finding that there was no objective evidence of the Campbells' emotional distress in this case is legally significant and is directly relevant to the Utah Supreme Court's erroneous assessment of the harm in this case as "akin to physical assault."

Furthermore, in its analysis of reprehensibility, this Court made plain that State Farm was not a "recidivist." 538 U.S. at 423. The Utah Supreme Court's reliance on the speculative and imaginary need to deter State Farm from similar acts in the future is precluded by that determination. Plaintiffs attempt to harmonize the Utah Supreme Court's analysis of this factor by stating that the Utah court "focused not on recidivism but on State Farm's propensity to commit further misconduct in the future," claiming that purported "propensity" is "separate from and not foreclosed by this Court's finding that State Farm was, at the time of trial, not a recidivist." Opp. at 17. The trial in this case took place in 1996, nearly 13 years after the excess verdict against Mr. Campbell. Thus, at the time of trial, it was not only clear that State Farm had never *before* the Campbell case refused a settlement offer and then exposed the insured to execution on an excess verdict, but it was clear that State Farm had not repeated its conduct in the 13 years *after* the Campbell case.

Plaintiffs now incorrectly and disingenuously claim that State Farm "misstate[d] the evidence" when it pointed out in its Petition that the evidence at trial showed "no similar subsequent bad acts." Opp. at 17. Plaintiffs argue that "[a]t trial

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[1] The trial court also stated that there was "a relatively limited period of time in which the primary stressor – that is, the threat of financial ruin – was a real threat to the Campbells." JA 3364.

State Farm was forced to acknowledge there were at least seven excess verdict third-party cases in Utah between 1978 and 1995." *Id.* at 18. It is uncontested that the evidence showed that State Farm resolved all seven excess verdict cases so that its insureds personally paid nothing and were not exposed to execution on the excess portion of the verdicts.[2] Indeed, this Court, having had the parties' briefing on the issue of the seven excess verdicts before it, ruled that plaintiffs "ha[d] shown no conduct by State Farm similar to that which harmed them." 538 U.S. at 424.[3] Plaintiffs' attempt to reargue this point is precluded by this Court's ruling. The Utah Supreme Court's punishment of State Farm as a potential recidivist is wholly speculative and contrary to this Court's ruling and to the fundamental principles of this Court's punitive damages jurisprudence.

Likewise, with regard to the other reprehensibility factors (whether the conduct showed "indifference or reckless disregard for the health and safety of others," whether the "target of the conduct had financial vulnerability," and whether the harm was the result of trickery, deceit, or mal-

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[2] Plaintiffs improperly attempt to bolster the Utah Supreme Court's speculation that State Farm might become a recidivist by citing to purported "testimony that State Farm subsequently failed to instruct its employees not to engage in the offending conduct, JA 2454; and by testimony that State Farm failed to discipline any employee. JA 2455." Opp. at 19. Both of these citations are to testimony by plaintiffs' expert Steven Prater that relates to dissimilar conduct that this Court has excluded from consideration in this case. *See* JA 2454 (Prater testimony regarding superseded State Farm manuals); JA 2455 (discussing testimony by State Farm ex-employee that she felt pressured to "reduce her average paid claims").

[3] The testimony of State Farm's regional vice president Buck Moskalski regarding State Farm's "peace of mind" letters was also discussed in the parties' briefs before this Court. Contrary to Plaintiffs' contentions, the "Peace of Mind" letters cited in State Farm's Petition were submitted with State Farm's Petition for Rehearing before the Utah Supreme Court, were not stricken or rejected, and are part of the record. Plaintiffs' assertions that State Farm had "revoked" its policy of sending "peace of mind letters" are incorrect and are based not on evidence, but on allegations in a 2001 complaint filed against State Farm by two ex-employees. Neither that complaint nor any other material submitted by plaintiffs claims that State Farm had ever again exposed any Utah insured to execution on an excess verdict after refusing a settlement offer within policy limits.

ice), the factual conclusions drawn by the Utah Supreme Court and the Utah trial court were before this Court and were discussed in the parties' briefing.[4] In particular, the Campbells' "vulnerability," to which plaintiffs now devote nearly two pages of their brief, was discussed in the parties' earlier briefing before this Court and in Justice Ginsburg's dissent. *See* 538 U.S. at 434; Pet. at 11-12. The Utah Supreme Court's legal conclusion that such facts evince extreme reprehensibility is contrary to this Court's legal conclusion that they do not.

B. The New Punitive Damages Award Unconstitutionally Punishes State Farm's Purported Lack of Remorse in Defending Itself in This Case

The Utah Supreme Court's new reprehensibility analysis was also based upon a factor not included in this Court's list of reprehensibility factors – namely, State Farm's supposed lack of remorse, pride and defiance, as demonstrated by the testimony at trial of State Farm employees that they were "proud" of State Farm and State Farm's failure to express remorse in its appeal briefs to the Utah Supreme Court. *See* Pet. at 20-25. Plaintiffs assert that State Farm's "complaint" that the Utah Supreme Court "punished it impermissibly for its 'appellate briefing' is baseless." Opp. at 19. To the contrary, the Utah Supreme Court's decision expressly relied upon State Farm's appellate briefing as a basis for punitive damages. *See* A.13; Pet. at 20-21, 24. By considering matters such as State Farm's purported failure to show remorse at trial and in its appeal briefs, the Utah Court impermissibly widened the reprehensibility inquiry beyond "the conduct that harmed" the Campbells, which this Court stated was "the

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[4] Plaintiffs' allegations of trickery and deceit in State Farm's handling of the claims against Mr. Campbell were based upon the purported fact that State Farm supervisor Bob Noxon manufactured the "story" of Todd Ospital's speeding to see his pregnant girlfriend. Plaintiffs now improperly take issue with State Farm's footnote discussion regarding the genesis of that purported fact. *See* Pet. at 16 n.8. The deposition cited by State Farm was not, as plaintiffs claim, "inadmissible and uncorroborated hearsay" "dredged up" by State Farm (Opp. at 7), but was published to the jury at trial on State Farm's motion. R.10268:58 (Trial Tr. 6/25/96, at 13-58). The deposition was inadvertently omitted from the record on appeal, but has now been restored to the record. *See* Pet. at 16 n.8.

only conduct relevant to the reprehensibility analysis." 538 U.S. at 424. Plaintiffs do not explain how State Farm's appellate briefing and trial testimony by State Farm employees, including testimony by employees such as Paul Short who were not involved with the handling of the third-party claims against Mr. Campbell, could be deemed part of the conduct that harmed the Campbells or similar to that conduct.

Moreover, the Utah Supreme Court's punishment of State Farm's lack of remorse cannot be justified by that court's invocation of "Utah's values and traditions." A.7. Plaintiffs mischaracterize State Farm's petition as arguing that the Utah Supreme Court's mere "reference to 'Utah's values and traditions'" "represents a violation of federal due process." Opp. at 22. State Farm contended in its petition that the Utah Supreme Court impermissibly relied upon "Utah's values and traditions" to justify its departure from this Court's mandate and the federal constitutional due process analysis set out by this Court. Pet. at 16-20. State Farm does not dispute that state law may provide principles that work to constrain punitive damages and that this Court has approved such state law principles as protecting a defendant's due process right not to be subjected to arbitrary and excessive punishments. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 588 (1996) (Breyer, J., concurring) (a state's legal standards "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior"). Utah's values and traditions, however, as interpreted by the Utah Supreme Court, clearly do not offer any "significant constraints or protection against arbitrary results," but simply "provide an open-ended basis for inflating awards" where a defendant has chosen to defend against liability. *See id.* at 588, 591. Moreover, the Utah Supreme Court's invocation of this vague and elastic standard fails to provide the constitutionally required notice of what conduct may subject a defendant to a multi-million dollar penalty. Contrary to plaintiffs' contentions (Opp. at 22-23), this Court has not approved the kind of subjective, *ad hoc* application of state "values and traditions" engaged in by the Utah Supreme Court on remand in this case. *See BMW*, 517 U.S. at 588; *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (approving state law standards that "impose[] a

sufficiently definite and meaningful constraint" on punitive damages awards).[5]

Plaintiffs also complain that "State Farm's 'remorse' argument, if taken seriously, would invalidate the 'acceptance of responsibility' provision of the Sentencing Guidelines." Opp. at 20. The issues raised by the Utah Supreme Court's reliance on State Farm's purported lack of remorse at trial and in its appeal briefs have nothing whatsoever to do with criminal sentencing procedures. Indeed, this Court pointed out in this case that although punitive awards "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." 538 U.S. at 417. There is no statutory sentencing range to cabin the discretion of the court and jury, no statutory definition of the elements of conduct that may be punished, and no requirement of proof beyond a reasonable doubt. The Utah Supreme Court's reliance on State Farm's alleged failure to express remorse at trial and in its appeals briefs impermissibly burdens State Farm's due process right to defend itself in litigation and is inconsistent with this Court's opinion.

II. The Utah Supreme Court's Application of the Ratio Guidepost Is Erroneous and Contrary to This Court's Mandate

Plaintiffs assert that this Court did not intend to hold that a 1 to 1 ratio between punitive and compensatory damages was the constitutional maximum in this case. Opp. at 4, 9. Contrary to Plaintiffs' assertion, this Court made clear that while the possibility remained that an even lower ratio might be the constitutionally justifiable maximum, a 1 to 1 ratio was likely justifiable. As the Court stated, "[a]n application

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[5] Nor can the Utah Supreme Court's reliance on State Farm's purported lack of remorse be justified (as plaintiffs contend) as relevant to the possibility that State Farm would "'repeat [its] crime.'" Opp. at 20 (citation omitted); *see also id.* (State Farm "was not punished for its 'trial tactics and litigation conduct,'" but "in view of the likelihood that it would repeat its misconduct in the future."). Given that plaintiffs have shown no other instance of similar conduct by State Farm in Utah in the more than twenty years since the excess verdict against Mr. Campbell, any possibility of repetition is purely speculative. *See* Pet. at 13-15; *supra* at 4-5.

of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at *or near* the amount of compensatory damages." 538 U.S. at 429 (emphasis added).

State Farm respectfully submits that if the principle enunciated by this Court that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *id.* at 425, is ever to be applicable, it must be applied in this case, as this Court admonished. Moreover, although this Court's conclusion that this principle should govern in this case was buttressed by this Court's further conclusion that the compensatory award in this case contained a punitive component, it did not depend upon it. *See* Pet. at 28. Nonetheless, the Utah Supreme Court was not free to disregard this Court's conclusion that the emotional distress damages in this case contained a punitive component. 538 U.S. at 429. Nor was this issue within the "sole purview of the Utah court" by virtue of State Farm's "never having sought review in this Court on any of the components of that definition of compensable injury," as plaintiffs claim (Opp. at 25). *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) ("consideration of issues not present in the . . . petition for certiorari . . . is not beyond our power, and in appropriate circumstances we have addressed them"). In imposing punitive damages in a 9 to 1 ratio, the Utah Supreme Court impermissibly disregarded this Court's mandate and exceeded the due process limit on punitive damages in this case.

III. The Utah Supreme Court Erred in its Application of the Civil Penalties Guidepost

Plaintiffs contend that the fact, noted by the Utah Supreme Court in its new opinion (A. 17), that Utah's statutory $10,000 fine for a single act of fraud is the same as the fine that may be imposed upon an individual for the commission of a first degree felony, "reflects the [Utah] legislature's determination that the company's misconduct was very serious indeed." Opp. at 27. In fact, there is no statutory penalty in Utah for the precise conduct at issue in this case, and the Utah legislature has made no such determination as the plaintiffs

claim. Moreover, it is not reasonable to suppose that the Utah legislature intended, by its setting of a $10,000 fine, to convey its determination that a single instance of insurance company misconduct was as serious as a "first degree felony," as plaintiffs claim. Opp. at 27. To the contrary, under the Utah statutory provision setting forth the relevant comparable civil penalty of $10,000, a violation of Utah insurance law is specified to constitute a class B misdemeanor. *See* Utah Code Ann. § 31A-2-308(9)(a). That $10,000 fine – acknowledged by the Utah Supreme Court to be the relevant legislative penalty in this case – gave no "fair notice" that a single violation "might subject an offender to a multimillion dollar penalty," *see BMW*, 517 U.S. at 584, and clearly signals the excessiveness of the $9 million punitive damages award imposed by the Utah Supreme Court on remand.

CONCLUSION

This Court should grant State Farm's petition for a writ of certiorari. By disregarding this Court's carefully reasoned analysis and conclusions, the Utah Supreme Court failed to adhere to this Court's mandate, and therefore summary reversal pursuant to Supreme Court Rule 16 is warranted. *See, e.g.*, *Sumner v. Mata*, 455 U.S. 591, 596-97 (1982) (granting certiorari and summarily vacating where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to ensure compliance with its own remand orders"). Accordingly, this Court should summarily reverse the Utah Supreme Court's decision and instruct the Utah Supreme Court to enter a punitive damages award "at or near" the amount of compensatory damages, *i.e.*, no more than $1 million. *See Campbell*, 538 U.S. at 429. In the alternative, this Court should afford plenary review, with briefing and oral argument by the parties, of the important constitutional issues raised by the Utah Supreme Court's decision.

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Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Utah Supreme Court, like many other state and lower federal courts, has misunderstood and misapplied the guidance on judicial review of punitive damages awards that this Court set out in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America (the Chamber) respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters from petitioner and respondents indicating consent to file have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber has an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of the petition for a writ of certiorari because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell* ("*State Farm I*"), 538 U.S. 408 (2003), which they viewed as providing much needed guidance on judicial review of punitive damages awards. The Chamber is concerned, however, that many state and lower federal courts have misunderstood or failed to adhere to the guidelines set out in *State Farm I*. The decision that the petition for a writ of certiorari asks this Court to review – the ruling of the Utah Supreme Court on remand from this Court's

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part. No person or entity other than the Chamber and its members made a monetary contribution to the preparation and submission of this brief.

decision in *State Farm I* – is illustrative of the problem. Unless this Court reiterates and reaffirms the principles set out in *State Farm I*, the lack of uniformity in judicial review of punitive damages awards across the nation will prevent *State Farm I* from achieving its promise. American businesses will remain subject to arbitrary and excessive punishments precluded by the Due Process Clause.

The Chamber therefore respectfully submits this brief urging the Court to grant the petition for a writ of certiorari in this case in order to end the confusion in the state and lower federal courts and to ensure the integrity of this Court's mandate in *State Farm I*.

REASONS FOR GRANTING THE WRIT

This case presents a recurring issue of tremendous importance to American business – how to ensure the sound and fair administration of punitive damages awards in the nation's courts. In response to "skyrocketing" and "wholly unpredictable" punitive awards, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 10, 12 (1991) (internal quotation marks omitted), this Court has repeatedly grappled with the extent to which the Constitution limits the imposition of those awards. By the time of its most recent decision on the subject in *State Farm I*, the Court had firmly established that due process imposes both procedural and substantive limitations on punitive damages, and that the constitutional requirements include judicial review to ensure that punitive awards are neither arbitrarily imposed nor excessive in amount. *See State Farm I*, 538 U.S. at 416-18.

In *State Farm I*, the Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that the defendants had fair notice of the potential amount of the awards. The Court elaborated on each of the three guideposts that it had previously instructed reviewing courts to consider: (1) the degree of the reprehensibility of the defendant's mis-

conduct; (2) the ratio between the punitive damages award and the harm suffered by the plaintiff; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. *State Farm I* was widely hailed as a watershed decision that promised at last to bring order and rationality to judicial review of punitive damages awards.[2] Unfortunately, because state and lower federal courts have neither fully understood nor correctly applied the guidance that the Court provided in *State Farm I*, its promise has not been realized. And, unless this Court reiterates and reinforces that guidance, its promise will never be realized.

The ruling that the petitioner requests this Court to review, the opinion of the Utah Supreme Court on remand from this Court's decision in *State Farm I*, vividly illustrates that further guidance from this Court is imperative. As explained in the petition for a writ of certiorari, the Utah Supreme Court has

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[2] *See, e.g.*, David G. Savage, *Justices Act to Restrict Punitive Damage Awards: The Supreme Court Ruling is a Move to Control "Irrational and Arbitrary" Verdicts*, L.A. Times, Apr. 8, 2003, at 1 ("The . . . ruling sends a stern warning to state judges and juries to rein in excessive awards."); Editorial, *Punitive Damages on Trial*, Chi. Trib., April 12, 2003, at C26 ("The high court drew some badly needed guidelines on what is reasonable when the courts award punitive damages in civil cases."); Editorial, *Fair Punitive Damage Limits Set*, Business Insurance, Apr. 14, 2003, at 8 ("[The decision is] another welcome guidepost to the type of fair, balanced and predictable civil justice system that the American people and businesses both need and deserve."); Michael Hoenig, *Supreme Court Limits Punitive Awards*, N.Y. Law Journal, Apr. 14, 2003, at 3 ("[T]he U.S. Supreme Court clarified the outer boundaries of punitive damages and eclipsed any hopes . . . that punitive damages could continue to be unbridled windfalls given by angry juries."); Thomas R. Newman & Steven J. Ahmuty, Jr., *Appellate Review of Punitive Damages*, N.Y. Law Journal, Apr, 16, 2003, at 3 ("[The holding] provides the clearest guidance to date concerning the permissible size of punitive damages."); Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, Bus. Week, Apr. 21, 2003, at 78 (arguing that "[t]he ruling should inject a level of predictability into high-stakes litigation").

misunderstood and misapplied the instructions that this Court gave on each of the three guideposts for review of punitive damages awards. Those mistakes are not isolated errors by a single court that has alone failed to understand this Court's mandate. Examination of the 76 cases in which state and lower federal courts have reviewed punitive damages awards for compliance with due process in the wake of *State Farm I* reveals that the Utah Court's errors are symptomatic of widespread misapplication of this Court's decision. Although a few courts are correctly and faithfully applying *State Farm I*, many other courts are not.[3]

This Court should grant the petition for a writ of certiorari to clarify the principles set out in *State Farm I* and to ensure the correct and uniform application of that decision by the state and lower federal courts. Granting the petition will enable the Court not only to reaffirm the guidance that it provided in *State Farm I* but also to remind state and lower federal courts that they have an obligation to adhere to the Court's mandate when cases are remanded to them.

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[3] The cases analyzed in this brief include only those cases reported in Westlaw and Lexis in which courts, after *State Farm I*, reviewed punitive damages awards for compliance with the federal due process guarantee. We have excluded from the analysis cases that were decided under state law or in which there was a statutory cap on punitive damages that might have influenced the court's due process analysis. We have also excluded cases in which the court was imposing punitive damages in the first instance, cases reviewing arbitration awards (which are subject to a narrower standard of review), bankruptcy cases, and wrongful death cases in Alabama (because compensatory damages are not permitted in such cases). A full list of the cases included in our analysis is reprinted in an appendix to this brief. *See* App., *infra*, 1a-18a.

A. The Petition Should Be Granted To Ensure The Correct And Uniform Application Of *State Farm I* By The State And Lower Federal Courts

1. State Farm I *has had some positive impact.*

State Farm I has not been without some success in curbing arbitrary and excessive punitive damages awards. A number of state and federal courts appear to understand the decision and to be committed to applying it faithfully. For example, in *Williams v. Conagra Poultry Co.*, 2004 WL 1752583 (8th Cir. Aug. 6, 2004), a case involving a hostile work environment in violation of 42 U.S.C. § 1981, the court of appeals reduced a punitive damages award of more than $6 million to $600,000 – an amount equal to the compensatory damages. In arriving at that figure, the court noted that the compensatory damages were substantial and the defendant's conduct, while sufficiently reprehensible to justify some punitive damages, was not so egregious that it justified an unusually large award. The court specifically relied on this Court's guidance in *State Farm I* that, when compensatory damages are substantial, a 1-to-1 ratio between punitive and compensatory damages will often be the highest ratio permitted by due process. *See* 2004 WL 1752583 at *8.

Similarly, in *Johnson v. Ford Motor Co.*, 2003 Cal. App. Unpub. LEXIS (Nov. 25, 2003), *review granted*, 2004 Cal. LEXIS 2549 (Mar. 24, 2004), the court reduced a punitive damages award of $10 million to $53,435 – three times the compensatory damages. The court explained that the conduct was not particularly egregious because it caused only economic injury, but the compensatory damages awarded were not large and did not include a punitive component. *Id.* at *7-*8.

In several other decisions as well, courts have carefully and conscientiously applied this Court's guidance in *State Farm I* to the relevant facts and appropriately vacated or reduced the punitive damages awards. Those cases demonstrate that the guidelines set out by the Court in *State Farm I* can rein in puni-

tive damages awards if courts understand them correctly and implement them faithfully.[4]

2. *Many punitive awards are still excessive even after they have been reduced on judicial review.*

Several other state and federal courts have, in reliance on *State Farm I*, substantially reduced the size of multi-million dollar punitive damages awards. For example, in *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003), the court reduced an award of $290 million to $23.7 million. In *Henley v. Philip Morris*, 9 Cal. Rptr. 3d 29 (Cal Ct. App. 2004), the court reduced an award of $50 million to $9 million. And, in this very case, the Utah Supreme Court reduced the punitive damages award substantially – from the $145 million award vacated by this Court to an award of slightly more than $9 million. There have been comparable reductions in the amount of damages in other cases.[5] Unfortunately, however,

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[4] *See, e.g., DiSorbo v. Hoy*, 343 F.3d 172 (2d Cir. 2003) (reducing $1.275 million award – 3.2 times compensatory damages – to $75,000 – 0.3 times compensatory damages); *United States v. Bailey*, 288 F. Supp. 2d 1262 (M.D. Fla. 2003) (vacating $3 million award because conduct was not sufficiently reprehensible to justify a punitive award); *Waits v. City of Chicago*, 2003 WL 21310277 (N.D. Ill. June 26, 2003) (unpublished) (reducing $2 million award – more than 133 times compensatory damages – to $45,000 – three times compensatory damages); *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. App. 2003) (vacating $4.8 million award – 25.7 times compensatory damages – and remanding for recalculation); *Blust v. Lamar Adver. Co.*, 2004 Ohio App. LEXIS 2167 (2004) (vacating $2.245 million award – more than 70 times compensatory damages – and remanding for a new trial); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003) (vacating $500,000 award – 20 times compensatory damages – and remanding for new trial on punitive damages).

[5] *See, e.g., TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($108 million reduced to $29.125 million); *Eden Electrical, Ltd. v. Amana Co.*, 258 F. Supp. 2d 958 (N.D. Iowa 2003) ($17.875 million reduced to $10 million), *aff'd*, 370 F.3d 824 (8th Cir. 2004); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) ($63 million reduced to $21 million), *cert. denied*, 124 S. Ct. 535 (2003); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App.

the awards in many of those cases (including this one) remain excessive even after they have been reduced, in large part because the reviewing courts have not fully and faithfully applied this Court's instructions in *State Farm I*.

Of the 76 cases in which courts have reviewed punitive damages awards since *State Farm I*, the awards in 35 (more than 46%) of the cases are a million dollars or more. *See* App., *infra*, 1a-11a. Ten of the awards exceed even $20 million, and one court has approved an award of $4.5 billion.[6]

3. Courts repeatedly misapply the State Farm I *guidelines.*

Even more troubling than the persistence of large awards is the fact that many courts, like the Utah Supreme Court here, are failing to apply *State Farm I* fully and faithfully. The errors being made by the state and lower federal courts involve all three of the guideposts for judicial review that the Court elucidated in *State Farm I*. But the most readily apparent mistakes concern application of the second guidepost – the ratio of the punitive damages award to the harm suffered by the plaintiff.

2003) ($14 million reduced to $1 million); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos., Inc.*, 2003 WL 21224088 (Cal. Ct. App. May 28, 2003) (unpublished) ($5 million reduced to $1 million); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, *modified on reconsideration*, 79 P.3d 908 (Or. Ct. App. 2003) ($22.5 million reduced to $3.5 million).

[6] *See In re Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) ($4.5 billion); *Planned Parenthood, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004) ($108.5 million); *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004) ($79.5 million); *S. Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003) ($60 million); *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($50 million), *cert. denied*, 124 S. Ct. 1423 (2004); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($29.125 million); *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 725287 (N.D. Ill. Apr. 1, 2004) ($27.7 million); *Union Pac. R.R. v. Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004) ($25 million); *Romo*, *supra* ($23.7 million); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003) ($21 million), *cert. denied*, 124 S. Ct. 535 (2003).

a. In *State Farm I*, this Court instructed that, "[w]hen compensatory damages are substantial," punitive damages "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." 538 U.S. at 425. Applying that principle to the facts of this case, the Court concluded that the compensatory award received by the plaintiffs – $1 million for a year and a half of emotional distress – was substantial. The Court further concluded that those damages already included a punitive component, because emotional distress damages, by their very nature, have a punitive element. *Id.* at 426. The Court therefore concluded that "a punitive damages award at or near the amount of compensatory damages" is likely the largest award that would be consistent with due process in this case. *Id.* at 429.

Despite that clear guidance, the Utah Supreme Court on remand determined that due process permits a punitive award nine times the size of the compensatory award. The Utah Court reasoned that this Court had erred in concluding that the compensatory award contains a punitive element, and further determined that the emotional distress damages awarded to the plaintiffs actually justify a higher punitive award, because conduct that causes emotional harm is "markedly more egregious" than conduct that causes economic harm. Pet. App. 14a-16a. That reasoning turns the guidance provided by this Court in *State Farm I* on its head.

The Utah Court is not alone in its disregard of this Court's instruction that a 1-to-1 ratio of punitive to compensatory damages is the constitutional limit in cases where compensatory damages are substantial. Reviewing courts have approved punitive damages awards with ratios of 2-to-1 or greater in over 80% of the 37 post-*State Farm I* cases in which compensatory awards (or the potential harm estimated by the court) exceeded $250,000. That statistic is sharply out of sync with the clear message in *State Farm I* that, when compensatory damages are already substantial, punitive damages in excess of compensatory damages are justifiable only in extraordinary cases.

In many of the cases in which courts have disregarded the 1-to-1 limit, the courts have not even acknowledged it. For example, in *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1423 (2004), the court of appeals approved a $50 million punitive award in a business dispute involving trade secret misappropriation, patent infringement, and fraudulent inducement of a contract. Although that award was more than three times the substantial compensatory award of $15 million, the court did not advert to the instruction in *State Farm I* that a 1-to-1 ratio is generally all that is appropriate when compensatory damages are substantial. Many other cases similarly fail to mention this Court's guidance.[7]

Some courts do acknowledge *State Farm I*'s endorsement of a 1-to-1 ratio but then proceed to ignore it. For example, in *Henley*, the California court noted this Court's instruction that "lower ratios – perhaps as low as 1 to 1 – may 'reach the outermost limit of the due process guarantee' where 'compensatory damages are substantial.'" 9 Cal Rptr. 3d at 72 (quoting *State Farm I*, 538 U.S. at 425). But the court then, without explanation, reinterpreted that instruction to allow a ratio as high as 4-to-1. *See id.* at 73. And the court then proceeded to approve punitive damages of $9 million – six times the "ample"

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[7] *See, e.g., Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630 (9th Cir. Jan. 12, 2004) (4.4 ratio despite $547,445 in compensatory damages for insurance bad faith); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003) (3.6 ratio despite $711,000 in compensatory damages that included emotional distress); *Interclaim Holdings Ltd., supra* (3.3 ratio despite $8.3 million in compensatory damages for breach of fiduciary duty and contract); *Diamond Woodworks, Inc., supra* (3.9 ratio despite $258,570 in compensatory damages for insurance bad faith, fraud, and breach of contract); *Taylor Woodrow Homes, Inc., supra* (3.4 ratio despite $293,000 in compensatory damages for insurance bad faith); *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003) (2.7 ratio despite $300,000 in compensatory damages for breach of contract, civil conspiracy, and various economic torts).

compensatory award of $1.5 million. *Id.* Other cases take a similar approach.[8]

Still other courts follow the approach of the Utah Supreme Court in this case and offer rationalizations for departing from the 1-to-1 ratio. For example, in *Hangarter v. Provident Life & Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), the court of appeals refused to reduce the punitive damages to achieve a 1-to-1 ratio in an insurance bad faith case in which the compensatory damages were $1.92 million. The court explained that, in its view, that ratio "is not binding, no matter how factually similar the cases may be." *Id.* at 1014. The court further justified its failure to follow the 1-to-1 guideline on the ground that only one third of the compensatory damages in the case were for emotional distress, while the compensatory award in *State Farm I* was "primarily" for emotional distress. *See id.* at 1015 n.11. The court did not mention, however, that the compensatory award in *Hangarter* was twice as large as the compensatory award in *State Farm I*, so the amount of emotional distress damages in the two cases were not that dissimilar.

In *Hollock v. Erie Insurance Exchange*, 842 A.2d 409 (Pa. Super. Ct. 2004), the court noted the *State Farm I* principle that a large punitive award is not justifiable where compensatory damages are substantial. *Id.* at 421. The court nonetheless ap-

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[8] *See, e.g., Stogsdill v. Healthmark Partners, L.L.C.*, 2004 U.S. App. LEXIS 15276 (8th Cir. July 23, 2004) (noting *State Farm I* statement about 1-to-1 ratio and acknowledging that the compensatory damages were "substantial" but approving a ratio of 4-to-1); *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004) (noting *State Farm I* statement about 1-to-1 ratio and acknowledging that compensatory damages were "significant" but approving a ratio of 4.8-to-1); *Shiv-Ram, Inc. v. McCaleb*, 2003 WL 23025586 (Ala. Dec. 30, 2003) (approving punitive award of 2.8 times compensatory damages even after finding that the damages had made the plaintiff whole for her injuries); *Harris v. Archer*, 134 S.W.3d 411, 438-39, 449 (Tex. Ct. App. 2004) (approving a 4-to-1 ratio in a case involving fraud and breach of fiduciary duty after quoting *State Farm I* and noting that the case fell into the 1-to-1 ratio category).

proved a punitive damages award of more than 10 times the compensatory damages of $278,825. *Id.* at 422. The court justified its decision by reasoning that the compensatory damages, which included attorneys' fees, costs, and interest, had no punitive element and therefore differed from the emotional distress award in *State Farm I.* Contrary to that characterization, however, an award of attorneys' fees and interest on those fees does have a punitive element, because it is a departure from the general rule in our judicial system that each party bears its own litigation costs. *See also In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1104 (D. Alaska 2004) (arguing that compensatory award of more than $513 million was not substantial because it was divided among many plaintiffs).

b. Another way that many state and lower federal courts have misinterpreted *State Farm I* is by treating single-digit ratios (especially ratios below 4-to-1) as providing a safe harbor from due process scrutiny. In *State Farm I*, the Court reiterated its guidance from earlier cases that a ratio of 4-to-1 will be "close to the line of constitutional impropriety" in most cases where compensatory damages are not substantial. 538 U.S. at 425 (citing *Haslip*, 499 U.S. at 23-24, and *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996)). The Court also instructed that, even in the most egregious cases, awards exceeding a single-digit ratio between punitive and compensatory damages will rarely satisfy due process. *Id.* A fair reading of the Court's analysis indicates that the Court was describing the *outer* limits of constitutional propriety, not establishing any safe harbors. No ratio, not even a 1-to-1 ratio, provides a shield from due process scrutiny. *See, e.g., Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915). Many courts, however, appear to have mistakenly read *State Farm I* to mean that a single-digit ratio, and particularly a ratio below 4-to-1, immunizes the punitive awards against further due process review.

The view that a single-digit or 4-to-1 ratio is a safe harbor manifests itself in several ways. One manifestation is that

courts frequently reduce awards so that the punitive-to-compensatory ratio is just below 10-to-1 or just below 4-to-1. This case is a good example: the Utah Court repeatedly noted that it had reduced the award to "nine times" the amount of compensatory and special damages. Pet. App. 1a, 19a; *see id.* at 16a (noting 9-to-1 ratio). Similarly, in *Exxon Valdez*, the district court reduced damages to a level of 8.8-to-1 after quoting the statement in *State Farm I* that "[s]ingle-digit multipliers are more likely to comport with due process." 296 F. Supp. 2d at 1106 (quoting *State Farm I*, 538 U.S. at 425). Later in the opinion, the court favorably quoted a Ninth Circuit decision stating that there is "no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio." *Id.* at 1109 (quoting *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003)).

Likewise, in *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003), the court stated that "a multiplier of 9 or less means that the punitive damages presumptively passes muster under the Due Process Clause." *Id.* at 1231. Then, after summarily approving the punitive damages awards on several claims because they "easily pass[] the single digit multiplier test," *id.*, the court reduced the punitive award on another claim to 9-to-1, stating that the court hoped it had "found the exact number that will not give [the plaintiff] a dime more than the Fourteenth Amendment allows, and not a dime less." *Id.* at 1237. *See also Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 108 (Cal. Ct. App. 2004) (reducing punitive award to 9.1-to-1 in order to achieve an award "within the single-digit threshold set out in" *State Farm I*).[9]

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[9] Other cases treat 4-to-1 ratios in a similar fashion, reducing awards to 4-to-1 or just below that ratio. *See, e.g., Textron Fin. Corp. v. Nat'l Union Fire Ins. Co.*, 13 Cal. Rptr. 3d 586, 604 (Cal. Ct. App. 2004) (citing *Diamond Woodworks* and reducing punitive award to achieve a 4-to-1 ratio); *Diamond Woodworks*, *supra*, at 762 (reducing punitive damages to 3.9-to-1 ratio after noting that "in the usual case . . . the outer constitutional limit on

The *McClain* case also illustrates another manifestation of the view that single-digit ratios are a safe harbor. Many courts reject due process challenges to punitive awards by doing no more than noting that the ratio of punitive to compensatory damages is within single digits or is less than 4-to-1. For example, in *Marmer v. Unicco Service Co.*, 2003 WL 22462053 (E.D. Pa. Oct. 2, 2003), the court disposed of the claim that the punitive damages award was excessive by citing *State Farm I* and stating that "[a]n award of punitive damages in an amount that is exactly double the award of compensatory damages, is not improper under settled legal standards." *Id.* at *6. Similarly, in *Reading Radio, Inc. v. Fink*, 833 A.2d 199 (Pa. Super. Ct. 2003), the court addressed the due process claim in a footnote that did no more than quote the statement in *State Farm I* that few awards exceeding a single-digit ratio will satisfy due process and state that "[t]he ratio between punitive damages and compensatory damages in this case is slightly greater than a 2 to 1 ratio." *Id.* at 215 n.3. And, in *Austin v. Specialty Transportation Services, Inc.*, 594 S.E.2d 867 (S.C. Ct. App. 2004), the court likewise quoted the ratio discussion in *State Farm I* and then declared, without further analysis, that ratios of between 2-to-1 and 3-to-1 were not excessive. *Id.* at 877.

Even cases that uphold awards after slightly more analysis appear to reflect the belief that ratios below 10-to-1 are immune from challenge. *See, e.g., Zhang*, 339 F.3d at 1044 ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."); *Rhone-Poulenc Agro*, 345 F.3d at 1372 (noting that "the pro-

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the amount of punitive damages is approximately four times the amount of compensatory damages"); *Taylor Woodrow Homes, supra*, at *4 (reducing punitive award to "somewhat less than four times the compensatories"); *Harris v. Archer*, 134 S.W.3d 411, 440 (Tex. Ct. App. 2004) (reducing punitive damages to achieve a ratio of 4-to-1); *see also* cases cited in note 8, *supra*.

portion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety" because it is "barely above three times the compensatory award of $15 million").

Another manifestation of the view that a single-digit ratio is a safe harbor is that some courts are inflating the denominator in order to bring the ratio within the single-digit range. For example, in *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 2003 WL 21321370 (E.D. Pa. May 30, 2003), an insurance bad faith case, the court did not compare the punitive award of $150,000 to the compensatory award of $2,000. Instead, the court calculated the ratio by comparing the punitive damages to the value of the plaintiff insured's claim under the policy, despite the fact that the insurance company had, albeit belatedly, paid the claim. The court then stated that the resulting ratio of 1-to-1 did not "raise a suspicious judicial eyebrow." *Id.* at *3 (quoting *Gore*, 517 U.S. at 583).

Similarly, in *Trinity Evangelical Lutheran Church v. Tower Insurance Co.*, 661 N.W.2d 789 (Wis.), *cert. denied*, 124 S. Ct. 925 (2003), another insurance bad faith case, the court upheld a punitive award of $3.5 million by comparing it, not to the $17,570 in compensatory damages, but instead to $490,000, the amount the insurer paid to discharge the insured's liability in the underlying accident suit involving the insured and a third party. The dissenting justice noted that there was never any possibility that the insured would have been required to pay that liability, and she charged the court with "manipulation of the ratio for purposes of due process scrutiny." *See id.* at 379 (Sykes, J., dissenting). Similarly, in *Simon v. San Paulo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003), *review granted*, 86 P.3d 881 (Cal. 2004), a breach of contract and fraud case, the court calculated the punitive-to-compensatory ratio using its own estimate of the plaintiff's expectation damages rather than the jury's compensatory award of $5,000 for out-of-pocket damages. The court then noted with approval that the ratio was just over 4-to-1. *See id.* at 390.

c. A final way that state and lower courts have been disregarding the *State Farm I* guidance on ratios is by approving awards with double-digit ratios of punitive to compensatory damages. Seventeen (more than 20%) of the 76 post-*State Farm I* cases have upheld awards with ratios of 10-to-1 or greater. Although many of those cases involve small compensatory awards that might be thought to justify higher ratios, a significant number of the cases involve compensatory awards of several hundreds of thousands of dollars.

For example, in *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003), a case involving illegal interference with a merger by a state government official, the district court upheld a $60 million punitive damages award that was almost 154 times the compensatory award of approximately $390,000. In *Planned Parenthood v. American Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004), a case in which anti-abortion activists were found to have threatened abortion providers by publishing their names and addresses on posters and Internet websites, the court upheld $108 million in punitive damages, more than 206 times the compensatory damages of approximately $526,000. And, in *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), the court upheld a punitive damages award of $79.5 million, almost 97 times the compensatory damages of approximately $821,000. Although this Court noted in *State Farm I* that double-digit ratios might conceivably comply with due process where a particularly egregious act results in only a small amount of damages, 538 U.S. at 425, these cases, in which the economic damages totaled hundreds of thousands of dollars, plainly do not fall into that category.[10]

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[10] *See also Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003) (approving ratio of 11.3-to-1 with punitive damages of $2 million and compensatory damages of $176,262); *Hollock*, *supra* (upholding ratio of more than 10-to-1 with punitive damages of $2.8 million and compensatory damages of $278,825); *Collins Entertainment Corp. v. Coats & Coats*

4. The divergence in how state and lower federal courts are applying State Farm I *thwarts the due process protection that the decision seeks to provide.*

Substantial variation in how federal law is applied in different courts across the county is always a concern, but the lack of uniformity in the application of *State Farm I* is especially troubling. The absence of uniformity directly undermines the due process safeguards that this Court sought to provide when it established guidelines for judicial review of punitive damages awards.

Judicial review of punitive damages serves two primary functions under the Due Process Clause. First, it aims to ensure that defendants have fair notice of the penalties to which they are exposed. As this Court has explained, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm I*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). Second, judicial review seeks to eliminate grossly excessive awards. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* Neither of the goals of judicial review can be effectively achieved if different courts are applying the standards for review of punitive damages in materially different ways.

Many defendants in suits in which punitive damages are imposed operate nationwide businesses and are therefore subject to suit in multiple states and federal judicial districts. Because plaintiffs can frequently choose the forum in which they sue those defendants, the current lack of uniformity among dif-

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Rental Amusement, 584 S.E.2d 120 (S.C. Ct. App. 2003) (approving ratio of 10-to-1 with punitive damages of $1.569 million and compensatory damages of $157,450).

ferent courts makes it virtually impossible for the defendants to predict the penalties to which they may be exposed.

In addition, unless *all* courts adhere to the judicial review guidelines that *State Farm I* prescribes, the guidelines cannot effectively curb grossly excessive awards. Plaintiffs can choose to file their suits in those forums that do not rigorously apply the guidelines to curb excessive awards. Even apart from forum shopping, political pressures may prevent the guidelines from curbing excessive awards unless this Court sends a signal that the guidelines must be followed in all jurisdictions. As long as courts in some jurisdictions are applying the guidelines in a manner that does not prevent excessive awards, there may be political pressures on judges in states with elected judiciaries to follow suit.

It is thus imperative for this Court to provide further clarification of the standards that it set out in *State Farm I* and to send a strong message that the Court expects all state and federal courts to adhere to those standards. Otherwise, not only will federal law continue be applied differently in different jurisdictions, but American businesses and other defendants will continue to face arbitrary and excessive punishments that deprive them of their federal due process rights. The Court should grant the petition for a writ of certiorari.

B. The Petition Should Be Granted To Ensure The Integrity Of This Court's Mandate In *State Farm I*

The Court should grant the petition in this case, rather than await additional developments in the state and lower federal courts, because, as the above discussion illustrates, further guidance on the standards for judicial review of punitive damages awards is needed as soon as possible. But an equally compelling reason for the Court to grant this petition rather than await a future case is that reversal of the decision of the Utah Supreme Court is necessary to preserve the integrity of the Court's mandate in *State Farm I*.

When a case is remanded to a state or lower federal court for further proceedings, that court is obligated to conduct those proceedings in accordance with the mandate of this Court. *See Briggs v. Penn. R.R.*, 334 U.S. 304, 306 (1948); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940). The opinion of this Court is a part of its mandate, and the lower court is not free to disregard the guidance in the opinion or to reinterpret the opinion to suit its own purposes. *See Rogers v. Hill*, 289 U.S. 582, 587 (1933); *Gulf Refining Co. v. United States*, 269 U.S. 125, 135 (1925). When a lower court has failed to adhere to this Court's mandate, this Court has not hesitated to review the case again in order to ensure that its mandate is respected. *See, e.g., Yates v. Evatt*, 500 U.S. 391 (1991) (reversing the judgment of the South Carolina Supreme Court after granting certiorari three times in the same case); *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 469 (1969) (vacating district court order and remanding where order entered settlement that did not comply with this Court's mandate); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court."). That course of action is warranted here.

The Utah Supreme Court's decision on remand in this case does not adhere to the mandate of *State Farm I*. This Court's opinion in *State Farm I* instructed that "[a]n application of the [three] guideposts [for review of punitive damages] to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. The Court remanded for the Utah courts to calculate the precise amount of punitive damages to be awarded. *Id.* But that remand did not give the Utah Supreme Court license to disregard entirely this Court's assessment of the appropriate penalty. The Utah Court's imposition of punitive damages

equal to nine times the amount of compensatory damages cannot be reconciled with this Court's instruction that a 1-to-1 ratio is likely the highest ratio that is permissible.

Furthermore, this Court specifically determined that the compensatory damages that had been awarded in this case were "substantial," and that they "contained a punitive element." *State Farm I*, 538 U.S. at 429. In direct conflict with that determination, the Utah Supreme Court held on remand that the "compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages." Pet. App. 15a. And the Utah Court relied on that fact (*id.*) to support its refusal to apply this Court's instruction that a 1-to-1 ratio is the "the outermost limit" consistent with due process "[w]hen compensatory damages are substantial." *State Farm I*, 538 U.S. at 425.

In direct conflict with this Court's opinion, the Utah Supreme Court relied on the plaintiffs' receipt of significant damages for emotional distress to justify an unusually large punitive award. The Utah Court stated that it had "no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm. Furthermore, such conduct is a candidate for the imposition of punitive damages in excess of a 1-to-1 ratio to compensatory damages." Pet. App. 16a. That reasoning flies in the face of this Court's instruction that the large emotional distress award weighed *against* a large punitive award. *See State Farm I*, 538 U.S. at 426.

The Utah Supreme Court's decision on remand departs so clearly and so far from this Court's mandate in *State Farm I* that this Court cannot allow it to stand. That is particularly true because of the high public visibility of this case. Although it is well established that a denial of certiorari creates no legal precedent, *see, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), a denial can have practical impact – particularly in case as closely watched as this one. *Cf.* Robert L. Stern et al., Su-

preme Court Practice 308-09 (8th ed. 2002) (noting improper tendency of lower courts to attach significance to denials of certiorari). A failure by this Court to take action here could unfortunately be viewed by some courts as acquiescence in the Utah Court's decision. And it could be misinterpreted by some courts as a signal that this Court is not committed to the principles that the Court laid down in *State Farm I*. The Court should send precisely the opposite signal, by granting the petition for a writ of certiorari and reversing the judgment of the Utah Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and set the case for briefing and argument. In the alternative, the Court should grant the petition and summarily reverse the decision of the Utah Supreme Court.

Respectfully submitted,

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APPENDIX

DUE PROCESS CHALLENGES TO PUNITIVE DAMAGE AWARDS AFTER *STATE FARM I*

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
In re Exxon Valdez, 296 F. Supp. 2d 1071 (D. Alaska 2004)	$5,000,000,000	$513,147,740	$4,500,000,000	$513,147,740	9.7	8.8
Planned Parenthood v. *Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004)	$108,500,000	$526,336.14	$108,500,000	$526,336.14	206.1	206.1
Williams v. *Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004)	$79,500,000	$821,485.80	$79,500,000	$821,485.80	96.8	96.8
Southern Union Co. v. *Southwest Gas Corp.*, 281 F. Supp. 2d 1090 (D. Ariz. 2003)	$60,000,000	$390,072.58	$60,000,000	$390,072.58	153.8	153.8

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Rhone-Poulenc Agro, S.A. v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 1423 (2004)	$50,000,000	$15,000,000	$50,000,000	$15,000,000	3.3	3.3
TVT Records v. *Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003), *Mot. for Costs and Fees granted in part, denied in part*, 288 F. Supp. 2d 506 (S.D.N.Y. 2003)	$108,000,000	$23,496,746	$29,125,000	$23,496,746	4.6	1.2

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Interclaim Holdings Ltd. v. *Ness, Motley, Loadholt, Richardson & Poole*, 2004 WL 725287 (N.D. Ill. Apr. 1, 2004)	$27,700,000	$8,300,000	$27,700,000	$8,300,000	3.3	3.3
Union Pac. R.R. v. *Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004)	$25,000,000	$5,100,000	$25,000,000	$5,100,000	4.9	4.9
Romo v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Ct. App. 2003)	$290,000,000	$4,574,429	$23,723,287	$4,574,429	63.4	5.2
Advocat, Inc. v. *Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S. Ct. 535 (2003).	$63,000,000	$15,000,000	$21,000,000	$5,000,000	4.2	4.2

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Bogle v. *McClure*, 332 F.3d 1347 (11th Cir. 2003), *cert. dismissed*, 124 S. Ct. 1168 (2004)	$14,000,000	$7,000,000	$13,300,000	$3,500,000	2.0	3.8
Eden Elec., Ltd. v. Amana Co., 370 F.3d 824 (8th Cir. 2004)	$10,000,000	$2,100,000	$10,000,000	$2,100,000	4.8	4.8
Campbell v. *State Farm Mut. Auto. Ins. Co.*, 2004 WL 869188 (Utah Apr. 23, 2004)	$145,000,000	$1,000,000	$9,018,780.75	$1,000,000	145.0	9.0
Henley v. *Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Ct. App. 2004), *review granted, depublished by*, 88 P.3d 497 (Cal. 2004)	$50,000,000	$1,500,000	$9,000,000	$1,500,000	33.3	6.0

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. 2004)	$5,000,000	$1,920,849	$5,000,000	$1,920,849	2.6	2.6
Trinity Evangelical Lutheran Church v. *Tower Ins. Co.*, 661 N.W.2d 789 (Wis. 2003), *cert. denied*, 124 S. Ct. 925 (2003)	$3,500,000	$490,000	$3,500,000	$490,000	7.1	7.1
Bocci v. *Key Pharm., Inc.*, 76 P.3d 669 (Or. Ct. App. 2003), *modified on recons.*, 79 P.3d 908 (Or. Ct. App. 2003)	$22,500,000	$500,000	$3,500,000	$500,000	45.0	7.0

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Sufix , U.S.A., Inc. v. *Cook*, 2004 WL 362177 (Ky. App. Feb. 27, 2004)	$3,000,000	$2,800,000	$3,000,000	$2,800,000	1.1	1.1
Hollock v. *Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. 2004)	$2,800,000	$278,825	$2,800,000	$278,825	10.0	10.0
Zhang v. *American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1602 (2004)	$2,600,000	$360,000	$2,600,000	$360,000	7.2	7.2
Gallegos v. *Elite Model Mgmt. Corp.*, 2004 WL 51604 (N.Y. Sup. Ct. Jan. 6, 2004)	$2,600,000	$1,100,000	$2,600,000	$1,100,000	2.4	2.4

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Austin v. *Specialty Transp. Servs., Inc.*, 358 S.C. 298 (S.C. Ct. App. 2004)	$2,600,000	$1,025,000	$2,600,000	$1,025,000	2.5	2.5
McClain v. *Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225 (N.D. Ala. 2003)	$3,100,000	$711,000	$2,550,000	$711,000	4.4	3.6
Greenberg v. *Paul Revere Life Ins. Co.*, 2004 WL 74630 (9th Cir. Jan. 12, 2004), rehearing denied, 2004 U.S. App. LEXIS 4238 (9th Cir. Mar. 4, 2004), *cert. denied*, 124 S. Ct. 2918 (2004)	$2,400,000	$547,445.42	$2,400,000	$547,445.42	4.4	4.4

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Phelps v. *Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)	$2,000,000	$176,261.64	$2,000,000	$176,261.64	11.3	11.3
Stogsdill v. Healthmark Partners, L.L.C., 2004 U.S. App. LEXIS 15276 (8th Cir. July 23, 2004)	$5,000,000	$500,000	$2,000,000	$500,000	10.0	4.0
Simon v. *San Paulo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367 (Cal. Ct. App. 2003), *review granted*, *depublished by*, 86 P.3d 881 (Cal. 2004)	$1,700,000	$400,000	$1,700,000	$400,000	4.3	4.3
Maya B. v. *Vogel*, 2004 WL 551325 (Cal. Ct. App. Mar. 22, 2004)	$1,600,000	$790,000	$1,600,000	$790,000	2.0	2.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Collins Entm't Corp. v. *Coats & Coats Rental Amusement*, 584 S.E.2d 120 (S.C. Ct. App. 2003)	$1,569,013	$157,449.66	$1,569,013	$157,449.66	10.0	10.0
Bardis v. Oates, 14 Cal. Rptr. 3d 89 (Cal. Ct. App. 2004)	$7,000,000	$165,527.63	$1,500,000	$165,527.63	42.3	9.1
Borne v. *Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903 (Mass. App. Ct. 2003), *review denied*, 795 N.E.2d 573 (Mass. 2003)	$1,430,000	$424,000	$1,430,000	$424,000	3.4	3.4
Haggar Clothing Co. v. Hernandez, 2003 WL 21982181 (Tex. Civ. App. Aug. 21, 2003)	$1,400,000	$210,000	$1,400,000	$210,000	6.7	6.7

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Asa-Brandt, Inc. v. ADM Investor Serv., Inc., 344 F.3d 738 (8th Cir. 2003)	$1,250,000	$3,900,000	$1,250,000	$3,900,000	0.3	0.3
Taylor Woodrow Homes, Inc. v. *Acceptance Ins. Cos., Inc.*, 2003 WL 21224088 (Cal. Ct. App. May 28, 2003)	$5,000,000	$293,000	$1,000,000	$293,000	17.1	3.4
Diamond Woodworks, Inc. v. *Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736 (Cal. Ct. App. 2003), *req. for depublication denied*, 2004 Cal. LEXIS 44 (Jan. 14, 2004)	$14,000,000	$424,100	$1,000,000	$258,570	33.0	3.9

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Bettelman Rec. Enterprises v. City of South El Monte, 2004 Cal. App. Unpub. LEXIS 6448 (July 12, 2004)	$875,000	$600,530	$875,000	$600,530	1.5	1.5
Harris v. *Archer*, 134 S.W. 2d 411 (Tex. Civ. App. 2004)	$1,500,000	$203,895	$815,580	$203,895	7.4	4.0
Reading Radio, Inc. v. *Fink*, 833 A.2d 199 (Pa. Super. 2003)	$805,000	$300,000	$805,000	$300,000	2.7	2.7
Williams v. Conagra Poultry Co., 2004 WL 1752583 (8th Cir. Aug. 6, 2004)	$6,063,750	$600,000	$600,000	$600,000	10.1	1.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Alberts v. Franklin, 2004 Cal. App. Unpub. LEXIS 5698 (June 16, 2004)	$586,000	$241,595.75	$586,000	$241,595.75	2.4	2.4
Gibson v. Total Car Franchising Corp., 2004 U.S. Dist. LEXIS 15205 (M.D.N.C. July 28, 2004)	$550,000	$176,124	$550,000	$176,124	3.1	3.1
Shiv-Ram, Inc. v. *McCaleb*, 2003 WL 23025586 (Ala. Dec. 30, 2003)	$500,000	$176,572.82	$500,000	$176,572.82	2.8	2.8
Waddill v. *Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003)	$1,000,000	$100,854	$403,416	$100,854	9.9	4.0
Mathias v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003)	$372,000	$10,000	$372,000	$10,000	37.2	37.2

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Textron Fin. Corp. v. Nat'l Union Fire Ins. Co., 13 Cal. Rptr. 3d 586 (Cal Ct. App. 2004)	$1,700,000	$89,744	$360,000	$89,744	18.9	4.0
Brandstetter v. *Holiday Retreats, Inc.*, 2003 WL 22391270 (Cal. Ct. App. Oct. 21, 2003)	$325,000	$125,000	$325,000	$125,000	2.6	2.6
Betterman v. *Fleming Cos.*, 2004 WL 291403 (Wis. Ct. App. Feb. 17, 2004)	$300,000	$255,666	$300,000	$255,666	1.2	1.2
Alfa Life Ins. Co. v. Jackson, 2004 Ala. LEXIS 118 (Ala. Sup. Ct. May 7, 2004)	$1,500,000	$500,000	$300,000	$100,000	3.0	3.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Myers v. Workmen's Auto Ins. Co., 2004 Ida. LEXIS 156 (July 23, 2004)	$300,000	$735	$300,000	$735	408.2	408.2
Hudson v. *Cook*, 105 S.W.3d 821 (Ark. Ct. App. 2003)	$250,000	$35,000	$250,000	$35,000	7.1	7.1
Shales v. *General Chauffeurs, Salesdrivers & Helpers Local Union No. 330*, 2003 WL 22038643 (N.D. Ill. Aug. 28, 2003)	$250,000	$171,500	$250,000	$171,500	1.5	1.5
Waddell v. Roxane Labs, 2004 Ohio App. LEXIS 2021 (May 6, 2004)	$250,000	$135,000	$250,000	$135,000	1.9	1.9

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Craig v. *Holsey*, 590 S.E.2d 742 (Ga. Ct. App. 2003), *cert. denied*, (Ga. 2004)	$200,000	$8,801.40	$200,000	$8,801.40	22.7	22.7
Reatta Resources, Inc. v. *Kraft*, 2004 WL 423144 (Tex. Civ. App. Mar. 9, 2004)	$200,000	$6,000	$200,000	$6,000	33.3	33.3
Willow Inn, Inc. v. *Pub. Serv. Mut. Ins. Co.*, 2003 WL 21321370 (E.D. Pa. May 30, 2003)	$150,000	$150,000	$150,000	$150,000	1.0	1.0
Jones v. *Sheahan*, 2003 WL 22508171 (N.D. Ill. Nov. 4, 2003)	$750,000	$25,000	$150,000	$25,000	30.0	6.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Tapalian v. Tusino, 2004 U.S. App. LEXIS 15252 (1st Cir. July 23, 2004)	$150,000	$58,843	$150,000	$58,843	2.5	2.5
Marmer v. *Unicco Serv. Co.*, 2003 WL 22462053 (E.D. Pa. Oct. 2, 2003)	$140,000	$70,000	$140,000	$70,000	2.0	2.0
Werremeyer v. K.C. Auto Salvage, Co., 2003 Mo. App. LEXIS 1074 (June 30, 2004), *rev'd in part on other grounds*, 134 S.W.3d 633 (Mo. 2004)	$125,000	$9,000	$125,000	$9,000	13.9	13.9
In re Moeller, 2004 Cal. App. Unpub. LEXIS 4767 (May 17, 2004)	$100,000	$50,000	$100,000	$50,000	2.0	2.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
DiSorbo v. *Hoy*, 343 F.3d 172 (2d Cir. 2003), *aff'd*, 74 Fed. Appx. 101 (2003).	$1,275,000	$400,000	$75,000	$250,000	3.2	0.3
Harrelson v. *R.J.*, 2003 WL 22520219 (Ala. Nov. 7, 2003)	$75,000	$15,000	$75,000	$15,000	5.0	5.0
Citizens Nat'l Bank v. Allen Rae Invs., Inc., 2004 WL 454083 (Tex. Civ. App. Mar. 11, 2004), *rehearing denied*, 2004 WL 1595732 (Tex. Civ. App. July 15, 2004).	$65,000	$123,390.43	$65,000	$25,890.43	0.5	2.5
Lincoln v. *Case*, 340 F.3d 283 (5th Cir. 2003)	$100,000	$500	$55,000	$500	200.0	110.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Johnson v. *Ford Motor Co.*, 2003 Cal. App. Unpub. LEXIS 2003 (Nov. 25, 2003), *review granted*, 2004 Cal. LEXIS 2559 (Mar. 24, 2004)	$10,000,000	$17,811.60	$53,435	$17,811.60	561.4	3.0
Sherman v. *Kasotakis*, 314 F. Supp. 2d 843 (N.D. Iowa 2004)	$50,000	$4	$50,000	$4	12500.0	12500.0
Waits v. *City of Chicago*, 2003 WL 21310277 (N.D. Ill. June 6, 2003)	$2,000,000	$15,000	$45,000	$15,000	133.3	3.0
Williams v. *Kaufman County*, 352 F.3d 994 (5th Cir. 2003)	$45,000	$300	$45,000	$300	150.0	150.0

Case	Punitive Damages Before Review	Compensatory Damages or Potential Harm Before Review	Punitive Damages After Review	Compensatory Damages or Potential Harm After Review	Damages Ratio Before Review	Damages Ratio After Review
Stack v. *Jaffee*, 2003 WL 23315191 (D. Conn. July 30, 2003)	$200,000	$2,000	$25,000	$2,000	100.0	12.5
Dunn v. *Village of Put-In-Bay, Ohio*, 2004 WL 169788 (N.D. Ohio Jan. 26, 2004)	$23,422.50	$1,577.50	$23,422.50	$1,577.50	14.8	14.8
Tate v. *Dragovich*, 2003 WL 21978141 (E.D. Pa. Aug. 14, 2003)	$10,000	$1	$10,000	$1	10,000.0	10,000.0
Roth v. *Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003)	$500,000	$25,000	NA	$25,000	20.0	NA
United States v. *Bailey*, 288 F. Supp. 2d 1261 (M.D. Fla. 2003)	$3,000,000	$2,000,000	NA	$2,000,000	1.5	NA

Case	Punitive Damages Before Review	Compen-satory Damages or Potential Harm Before Review	Punitive Damages After Review	Compen-satory Damages or Potential Harm After Review	Dam-ages Ratio Before Review	Dam-ages Ratio After Review
Daka, Inc. v. *McCrae*, 839 A.2d 682 (D.C. App. 2003)	$4,812,500	$187,500	NA	$187,500	25.7	NA
Home Pride Foods of Iowa, Inc. v. *Martin*, 2003 WL 23005185 (Iowa Ct. App. Dec. 24, 2003)	$82,228	$0	NA	$0	Infinite	NA
Blust v. Lamar Adver. Co., 2004 Ohio App. LEXIS 2167 (May 14, 2004)	$2,245,000	$32,000	NA	$32,000	70.2	NA

Supreme Court, U.S.
FILED
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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, Special Aministrator and Personal Representative of the Estate of Curtis B. Campbell,

Respondents.

On Petition for a Writ of Certiorari to the Utah Supreme Court

BRIEF OF *AMICUS CURIAE* FREEDOMWORKS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the Utah Supreme Court's decision on remand contravened this Court's mandate in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and fundamental due process principles, by imposing a punitive damages award vastly in excess of the amount this Court deemed constitutionally permissible, by rejecting specific holdings and findings of this Court in its application of the constitutional punitive damages guideposts, and by relying on the defendants' perceived lack of remorse in its defense and appeal of this case as a basis for punitive damages?

The following three distinct issues (among others) are encompassed within this question:

1. Did the Utah Supreme Court err in failing to compare the punitive damages award to the civil sanction that could have been applied in the most relevant provision of Utah law because the court viewed this exercise, which is required by this Court's decisions, as "quixotic"?

2. Did the Utah Supreme Court err in equating transgressions that occur in the economic realm with physical assaults for purposes of the reprehensibility analysis, even though this Court's decisions draw a clear distinction between the two?

3. Did the Utah Supreme Court err in punishing State Farm for successfully appealing the $145 million punitive award to this Court on the ground that its decision to appeal, and its presentations on appeal, demonstrated a lack of remorse?

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INTEREST OF *AMICUS CURIAE*

FreedomWorks is a nonprofit, nonpartisan organization with approximately 360,000 members. One of its missions is to educate citizens on, and to promote the adoption of, free-market policies that inure to the benefit of consumers and citizens generally. Accordingly, FreedomWorks and one of its affiliated organizations, Citizens for a Sound Economy ("CSE"), have taken an active part in the public debate on antitrust enforcement, regulation of the Internet, deregulation of the telecommunications industry and a host of other issues that affect the Nation's economy.

FreedomWorks has an interest in this case because it is vitally interested in assuring that tort liability, including punitive damage liability, is calibrated to promote sound economic principles. When this case was last before the Court, an affiliate of CSE, the CSE Foundation, filed an *amicus curiae* brief. FreedomWorks and CSE continue to have a strong interest in the outcome of this litigation, and believe that the path chosen by the Utah Supreme Court is both inconsistent with the legal principles embodied in this Court's due process cases as applied to punitive damages awards and rational economic theory.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court brought much-

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[1] The parties have filed blanket written consents with the Clerk to the filing of *amicus* briefs in this case. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

Amicus Curiae adopts the facts and procedural history set forth in the petition for writ of certiorari.

needed clarity to the limits imposed by the Due Process Clause on court-imposed punitive damage awards. In a way that this Court's prior cases had not, *State Farm* gave notice to potential defendants of the scope of potential punitive damage awards, thereby facilitating greater certainty in economic planning. It is thus imperative that the Court vigilantly guard its pronouncements in *State Farm* against erosion by lower courts—state and federal. The constitutional rulings of this Court deserve substantially more respect than *State Farm* received in the Utah Supreme Court. If this Court does not respond, it will send a regrettable signal that lower courts may disregard *State Farm* with impunity.

For example, in its decision, this Court noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. This Court went on to reason that the facts of this case would not justify nearly so high an award:

> An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.

Id. at 429.

On remand, the Utah Supreme Court wholly ignored this Court's conclusion that a punitive award approximating the compensatory award was appropriate, calling it a mere "prediction." Pet. App. 5a. Having dismissed this Court's ruling out of hand, the Utah Court then proceeded to award plaintiffs punitive damages equal to nine times the compensatory award. That award approached the limit of this Court's single-digit ratio guideline, even though this Court's earlier opinion made clear that State Farm's conduct did *not*

approach the upper end of the "reprehensibility scale" outlined in that opinion.

As aptly demonstrated by the Petition for Certiorari, this Court should grant review in this case to ensure compliance with its prior ruling and to provide additional guidance to the lower courts on these important issues. *Amicus* wishes to highlight three more specific reasons why this Court's review is needed:

First, this Court should grant certiorari to enforce its earlier directive that lower courts consider similar penalties in their assessment of punitive damages. Here, the Utah Supreme Court ignored this Court's directive that it compare the punitive award to the magnitude of "'civil penalties authorized or imposed in comparable cases,'" 538 U.S. at 428 (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 575 (1996)), and that the "most relevant civil sanction under Utah state law . . . appears to be a $10,000 fine for an act of fraud." *Id.* at 428. The Utah Supreme Court decided that this comparison would not affect its analysis of the proper damage award in this case, referring to the comparison as "quixotic." Pet. App. 17a.

The Utah Supreme Court's decision to disregard this Court's instruction to compare the punitive award to other legislatively authorized penalties is particularly troubling, and worthy of review, because it creates a very real risk of overdeterrence. Inherent in this Court's rulings is an understanding that courts should give significant deference to the legislature's considered judgment of what level of punishment should be applied in a given case. Failing to give such deference creates a very real risk of overdeterrence, which can force manufacturers to stop producing useful products or can force insurance companies to stop offering certain forms of insurance. This Court should grant certiorari to ensure that courts give some weight to the carefully considered judgments of legislatures on the necessary level of

deterrence in considering the size of a punitive damage award.

Second, certiorari is likewise appropriate because the Utah Supreme Court, in its reprehensibility analysis, improperly equated economic conduct with "physical assault." This Court's decisions, including its prior decision in this case, make plain that transgressions that occur in the economic realm simply are not as reprehensible as physical assaults or other physical invasions. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 514 U.S. 559, 575-76 (1996); *State Farm*, 538 U.S. at 426. To justify the excessive punitive damage award in this case, however, the Utah Supreme Court ignored these precedents and concluded that State Farm's actions were especially reprehensible because they were "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a.

If left undisturbed, the Utah Supreme Court's ruling would make punitive damages wholly unpredictable. It would thereby undermine the deterrent value of punitive damages because potential defendants will be unable to determine what actions are likely to lead to an exorbitant punitive award. This Court should grant certiorari so that it can make clear that economic transgressions are categorically not as reprehensible as physical assaults.

Third, certiorari is also appropriate because the Utah Supreme Court improperly concluded that State Farm could be punished for vigorously contesting the $145 million punitive award that this Court found excessive. This Court has held on numerous occasions that individuals (and companies) may not be punished for exercising their constitutionally protected rights. See, *e.g.*, *Griffin* v. *California*, 380 U.S. 609 (1965); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). On remand from this Court, however, the Utah Supreme Court proceeded to punish State Farm for daring to challenge that court's ruling that a $145 million punitive award was justified. This Court should grant

certiorari to establish that a litigant cannot be punished, via an enhanced punitive damage award, for advocacy that is vigorous yet undertaken in good faith.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT THE ANALYSIS OF "SIMILAR PENALTIES" REQUIRED BY THIS COURT'S DECISIONS CANNOT BE DISREGARDED OR CIRCUMVENTED SIMPLY BECAUSE A REVIEWING COURT DISAGREES WITH THIS COURT'S JUDGMENT ABOUT THE NEED FOR THAT ANALYSIS.

One important reason to grant plenary review, or even summary reversal, in this case is to enforce the Court's earlier directive that lower courts consider similar penalties in their assessment of punitive damages. In *State Farm*, this Court specifically reiterated that a court reviewing a punitive damages award should be guided by the magnitude of "'civil penalties authorized or imposed in comparable cases.'" 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). In particular, "'legislative judgments concerning appropriate sanctions for the conduct at issue'" should be accorded "'substantial deference'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). And here, this Court explained that the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud," which is "dwarfed by the $145 million punitive damages award." *State Farm*, 538 U.S. at 428.

Despite that clear ruling, on remand, the court below concluded that this guidepost would have no impact on its analysis of the appropriate punitive award. Indeed, the court below was openly hostile to such comparisons, asserting that

"the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based upon penalties affixed by a legislature can be quixotic." Pet. App. 17a. The court thus concluded, without further elaboration, "that $9,018,780.75 is amply supported by the $10,000 civil penalty." *Id.* at 18a. That conclusion warrants this Court's review, for reasons of both law and sound economic policy.

A. The Utah Supreme Court's Decision Conflicts With This Court's Requirements.

First of all, the decision below clearly conflicts with this Court's decisions. In *Gore*, this Court explained that "[e]lementary notions of fairness" require "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. There, the Court observed that the "maximum civil penalty authorized by the Alabama Legislature" for conduct comparable to the non-disclosure at issue in that lawsuit was $2,000. *Id.* at 584. Given this maximum statutory penalty, the *Gore* Court concluded that a defendant would not have "fair notice" that a failure to disclose information "might subject an offender to a multimillion dollar penalty." *Id.* Moreover, the Court explained that the statutory penalties for comparable conduct were relevant to determine whether the sanction imposed "was necessary to deter future misconduct" in that the maximum statutory fine reflected the State legislature's assessment that "less drastic remedies could be expected to achieve that goal." *Id.*; see also *State Farm*, 538 U.S. at 428 (explaining that punitive award "dwarfed" the "civil sanction under Utah state law").

In its decision below, the Utah Supreme Court rendered this guidepost and its underlying principles a nullity by approving a punitive award more than 900 times larger than the maximum civil penalty authorized by the Utah Legislature for the "most relevant civil sanction." *State Farm*, 538 U.S. at 428. The court reached that result by suggesting that this

Court's decision implicitly "endorsed a punitive damages award of $1 million which is one hundred times greater than the $10,000 fine." Pet. App. 17a. The court then reasoned that a punitive award 900 times greater than the fine must, therefore, still be "in line with the third *Gore* guidepost." *Id.* The court thus reduced the inquiry to an absurdity.

In doing so, the Utah Supreme Court ignored the principle that statutory penalties are critical to an evaluation of the excessiveness of a punitive damages award because they (1) provide "notice" of the "severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574, and (2) reflect the legislature's judgment regarding the magnitude of the sanction "necessary to deter future misconduct," *id.* at 584. Nowhere did the court below consider whether State Farm was somehow on notice that its conduct in this case could subject it to a penalty more than 900 times greater than the maximum sanction authorized by the Utah Legislature. Similarly, the court did not consider the Utah Legislature's judgment about the appropriate sanction necessary to "deter future misconduct" of the sort at issue in this case, and whether State Farm could be deterred through a puntive damages award more in keeping with the Utah Legislature's judgment. *Id.*

B. As A Matter Of Sound Economic Policy, It Is Important To Look Closely At Similar Penalties Because They Embody A Legislative Judgment About The Proper Amount Of Punishment Needed To Provide Adequate Deterrence Against The Type Of Conduct At Issue.

Not only does the decision below flout this Court's established precedent, it ignores the importance of legislative judgments about the appropriate level of sanction necessary to provide adequate deterrence.

Ideally, a tort system should perform two functions: compensate victims and deter and punish bad acts. With

regard to deterrence and punishment, it is critically important, from an economic perspective, to avoid excessive punitive awards. Often, a significant compensatory award both makes the plaintiff whole, and creates powerful economic incentives for a defendant to avoid future improper conduct. See *State Farm*, 538 U.S. at 425. To be sure, "a multimillion dollar penalty" may "prompt[] a change in policy" but that "sheds no light on the question whether a lesser deterrent would have adequately protected the interests of [a State's] consumers." *Gore*, 538 U.S. at 584.

Indeed, excessive punitive awards impose significant economic costs reflected in higher product prices or the disappearance of desirable products from the market.[2] The costs associated with excessive awards impose unnecessary economic hardship on the defendant when a smaller award would be sufficient to deter the same future, improper conduct. These costs, in turn, may impose unnecessary hardship on consumers forced to pay higher prices or to forgo useful products.

In striking the appropriate balance, this Court has properly counseled that special deference be paid to legislative judgments about the magnitude of a sanction necessary to punish and deter similar conduct. *Id.* Given the judgment of the Utah legislature here, the decision of the court below to insist upon a punishment more than 900 times greater than the maximum penalty authorized by the legislature for comparable conduct imposes an excessive punitive award on

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[2] *E.g., Insurance Companies, Fearing Jury Verdicts, Shy Away From State*, Associated Press State & Regional Wire, June 19, 2001, *available at* LEXIS NEWS/APST (noting that 40 insurers doing business in Mississippi have stopped selling certain kinds of insurance or pulled out of the state entirely as a response to excessive jury verdicts); *Battle Brews in Arkansas Over Nursing-Home Liability*, Bert's Ins. News, Oct. 10, 2001, *available at* 2001 WL 24725205 (explaining that only two of 80 insurers that have authority to write liability policies for nursing homes in Arkansas are doing so).

State Farm. At the same time it harms the economic interests of consumers who will, directly or indirectly, be required to bear this unwarranted burden in the form of higher prices, reduced consumer choice, or both.

II. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT ECONOMIC AND EMOTIONAL HARM CANNOT BE EQUATED WITH "PHYSICAL ASSAULT" IN THE "REPREHENSIBILITY" ANALYSIS.

Another reason to grant review is the lower court's departure from this Court's teaching about the difference between economic conduct and physical violence. In *State Farm*, this Court made clear that one factor to be considered in the reprehensibility analysis is whether "the harm caused was physical as opposed to economic." *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 576-77). On remand, the Utah Supreme Court ignored the clear mandate of this Court's ruling—that transgressions committed in the economic realm are inherently not as reprehensible as are physical harms. Instead the court below concluded that "misconduct which occurs in the insurance sector of the economic realm is likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a.

This Court should grant certiorari to review the Utah Supreme Court's equation of damages that result from an economic transgression and those that result from a physical assault. This ruling is contrary to this Court's precedents and threatens to interfere with sound economic policy by making the award of punitive damages less predictable.

A. The Utah Supreme Court's Decision Conflicts With This Court's Analysis Of The Reprehensibility Issue.

This Court's prior decision made clear that economic transgressions are not as reprehensible as are physical assaults. Indeed, in noting that reprehensibility did not weigh

heavily in favor of a high punitive award in this case, this Court explained that "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries." *State Farm*, 538 U.S. at 426. This Court made plain that State Farm's actions, while tortious, were not as reprehensible as a physical assault.

As noted earlier, the Utah Supreme Court ignored this clear mandate by concluding that State Farm's conduct was just as reprehensible as a physical assault because its actions were "likely to cause injury more closely akin to physical assault or trauma than to mere economic loss." Pet. App. 10a-11a. To reach this conclusion, the court below was forced to shift the focus of the inquiry away from the nature of the conduct that it criticized toward the harm caused. In doing so, the court below attached an implausible meaning to this Court's words: "The Supreme Court's observation is carefully phrased. It does not classify the injury inflicted on the Campbells by State Farm as 'economic.' Rather, it notes that the transaction which gave rise to the injury was in the 'economic realm.'" *Id.* at 9a.

But that word-play should not be allowed to stand. This Court's precedents, including its prior opinion in this case, make clear that the relevant question in the reprehensibility analysis is the blameworthiness of the defendant—an inquiry that focuses on the nature of the *defendant's* conduct. As this Court explained in *Gore*, "[the reprehensibility] principle reflects the accepted view that some wrongs are more blameworthy than others. Thus, we have said that 'nonviolent crimes are less serious than crimes marked by violence or the threat of violence.'" 517 U.S. at 575-76 (quoting *Solem* v. *Helm*, 463 U.S. 277, 292-93 (1983)).

The Court's guidance on the application of the reprehensibility factor thus tracks a basic intuition built into an legal culture—that certain acts are, by their very nature, more blameworthy than others. And one of the primary

indicators of such blameworthiness is whether an act is violent or carries an inherent risk of physical injury.[3]

Accordingly, in its statement in *Gore*, this Court focused on the nature of the activity—not the nature of the harm. This focus makes good sense. In determining the reprehensibility of the defendants' actions, courts should focus on what the defendant did—*i.e.*, did the wrongdoing occur in the context of an economic transaction or was it an act aimed at causing physical harm to the plaintiff.

In accord with this basic intuition, this Court has already decided that State Farm's behavior is categorically different than a case involving "physical assault or trauma." *State Farm*, 538 U.S. at 426. Certiorari is thus appropriate to overturn the Utah Supreme Court's disregard for this Court's precedents, including the Court's earlier decision in this very case.

B. As A Matter Of Sound Economic Policy, It Makes No Sense To Punish Business Conduct That May Impose Economic Or Even Emotional Harm As Severely As Physical Assault.

The Utah Supreme Court's decision to punish business conduct that may impose economic and emotional harm as severely as physical assaults should also be rejected because it creates vast uncertainty, thereby undermining the deterrence value of punitive damages.

One of the primary goals of punitive damages is to deter individuals from engaging in reprehensible behavior. See, *e.g.*, *State Farm*, 538 U.S. at 416 ("[P]unitive damages serve a broader function; they are aimed at deterrence and

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[3] Other relevant considerations include whether the defendant targeted a particularly vulnerable individual or demonstrated a reckless disregard for the health and safety of others. *State Farm*, 538 U.S. at 419. As with the distinction between a violent and non-violent act, these factors focus on the behavior of the defendant.

retribution."). From an economic standpoint, punitive damages are useful because the threat of a potential punitive award creates an economic incentive not to engage in reprehensible conduct. But punitive damages can be effective at deterring such conduct only to the extent that individuals can foresee liability. If a defendant cannot foresee punitive liability accruing as a result of given conduct, the threat of punitive damages will not have any deterrent effect.

Accordingly, rules for imposing punitive damages should be ordered to create the greatest degree of foreseeability possible. Bright-line rules that clearly delineate what behavior will be punished should thus be favored over ad hoc rules, which necessarily create uncertainty.[4]

The Utah Supreme Court's ruling ignores the necessity of bright-line rules governing punitive liability. By contrast, this Court's decisions provided a clear dividing line between damages caused by transgressions in the economic realm and physical injuries suffered as a result of physical assaults. *Gore*, 517 U.S. at 575-76; *State Farm*, 538 U.S. at 426. While this Court's decisions do not rule out punitive liability

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[4] In the context of punitive damages, bright-line rules are also appropriate for non-economic reasons: potential defendants are entitled, as a matter of due process, to know that their actions can lead to punitive damage liability and at what level of severity. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting) ("Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."). Favoring bright-line rules in the punitive context also is in accord with this Court's more general statements that, in the context of criminal statutes, potential defendants must be put on notice that their actions will create liability. *See, e.g.*, *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (explaining that the rule of lenity is designed to ensure that "'fair warning [is] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'").

for actions that merely cause economic harms, they clearly indicate that such liability should be relatively modest.

The Utah Supreme Court's decision effectively uprooted this principle, substituting in its place what amounts to a regime of "we know reprehensible economic conduct when we see it." That is, under Utah Supreme Court's decision, economic transgressions that courts deem particularly egregious will be held to warrant much higher punitive awards. But this category of behavior is not well-defined and a potential defendant cannot, with any confidence, predict whether its behavior will be deemed to fall within this category.

The decision, if not reversed, thus makes it nearly impossible for companies and individuals to predict, *ex ante*, what activities are sufficiently "reprehensible" to create disproportionately high punitive liability. The uncertainty created by the Utah Court's decision will lead, in turn, to negative economic effects. As one prominent commentator has put it:

> If awards are unpredictable . . . resources are likely to be wasted on [the calculation of the risk of a punitive award], and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

C. R. Sunstein et al., *Assessing Punitive Damages (With Notes On Cognition And Valuation In Law)*, 107 Yale L.J. 2071, 2077 (1998) (footnote omitted).

This Court should grant certiorari so that it can reestablish the bright-line rule laid down in *State Farm*, *i.e.*, that transgressions in the economic realm do not warrant punitive liability as severe as those for violent actions such as physical assaults.

III. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT A GOOD-FAITH VIGOROUS DEFENSE IN COURT CANNOT BE CONSIDERED EVIDENCE OF "REPREHENSIBILITY" IN THE REVIEW OF PUNITIVE DAMAGE AWARDS.

A final reason to grant review in this case is to resolve the issue of whether a vigorous defense can be considered a factor in the reprehensibility analysis. In *State Farm*, this Court reiterated that "'[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.'" 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). With regard to that factor, a "State cannot punish a defendant for conduct that may have been lawful where it occurred." *Id.* at 421. Thus, a State may not "punish and deter conduct that b[ears] no relation to the [plaintiff's] harm" or that is "independent from the acts upon which liability was premised." *Id.* at 422.

On remand, the Utah Supreme Court nevertheless proceeded to justify a $9 million punitive award based upon its disagreement with State Farm's litigation strategy in defending against plaintiff's lawsuit. Pet. App. 12a-14a. Thus, the court criticized State Farm's "'refus[al] in its brief on appeal to concede any error or impropriety in the handling of [plaintiff's] case'" and State Farm's "defiance" in failing to demonstrate to the lower court's satisfaction "that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of pride and victimization." *Id.* at 13a. That ruling merits this court's review because it is contrary to this Court's decisions and would improperly chill legitimate advocacy.

A. The Decision Below Conflicts With Controlling Decisions Of This Court.

1. This Court consistently has held that the Due Process Clause of the Fourteenth Amendment prevents imposition of

a punishment against a party based upon the exercise of a constitutional right. For example, in *Griffin* v. *California*, 380 U.S. 609 (1965), this Court ruled that a defendant's exercise of his right to remain silent, as guaranteed by the Fifth and Fourteenth Amendments, could not be penalized by a court through an instruction informing the jury that "such silence is evidence of guilt." *Id.* at 615. Such an instruction was unconstitutional because it was "a penalty imposed by courts for exercising a constitutional privilege." *Id.* at 614.

Similarly, in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court considered the limitations imposed by the Due Process Clause on the punishment of a defendant who successfully challenged a court's prior judgment. *Id.* at 724. The Court explained that it "would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence" where a defendant successfully challenges the original punishment meted out by the court. *Id.* at 723-24. The Court reasoned that "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due process of law," *id.* at 724, because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" thereafter, *id.* at 725.

Thereafter, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), this Court underscored the continuing vitality of cases such as *Pearce* by contrasting a plea bargain—which generally involve give-and-take negotiation—from "State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction." *Id.* at 362. The former conduct was permissible but the latter violated due process because, "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Id.* at 363 (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 33 & n.20 (1973)). The critical

factor for the Court was the bedrock principle that "[t]o punish a person because he has done what the law allows him to do is a due process violation of the most basic sort." *Id.*

In *Gore*, this Court applied these same due process limitations to analyze the proper scope of punitive damages awards. 517 U.S. at 572-73 & n.19. Relying upon *Bordenkircher*, the *Gore* Court held that a state could not impose a punishment to deter out-of-states conduct that "is lawful in other jurisdictions." *Id.* at 573. That limitation on a State's power to punish and deter out-of-state conduct that was legal where it occurred followed directly from the well-developed rule that a sentencing court could not "properly *punish* lawful conduct." *Id.* at 573 n.19; *accord State Farm*, 538 U.S. at 421.

2. The decision below creates a direct conflict with these decisions. That is because it unapologetically seeks to justify a punitive award in excess of $9 million on State Farm's exercise of its right to defend itself against plaintiff's claims at trial and the conduct of its appeal of the jury's verdict. Pet. App. at 12a-14a. The court below, pointing to State Farm's original appeal brief, held that (1) State Farm's "obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence" and (2) "State Farm has directed us to no evidence suggesting that it has gained insight into the wrongfulness of its behavior or has reconsidered its feelings of pride and victimization." *Id.* at 13a. Thus, the court below viewed State Farm's exercise of its statutory appellate rights—and perhaps even its resort to this Court—as "defiance" and "callousness" that justified an increased punitive award. *Id.*

This Court's cases, however, make plain that a party cannot be punished for engaging in conduct that is lawful. *Gore*, 517 U.S. at 572-73; *Bordenkircher*, 434 U.S. at 362; *Pearce*, 395 U.S. at 724; *Griffin*, 380 U.S. at 615. It follows that a defendant's exercise of its constitutional right to defend itself

in litigation cannot be used to justify imposition of a more severe punishment.

B. As A Matter Of Sound Economic Policy, It Makes No Sense To Punish Or Deter A Vigorous But Good-Faith Defense.

The decision below also creates harmful economic policy consequences by deterring and punishing legally protected conduct and undermining the efficient operation of the adversary system.

This Court has noted that punitive damages may be imposed "to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568; see also *State Farm*, 538 U.S. at 416. At the same time, "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 422-23. Indeed, even when such dissimilar conduct might be illegal, punitive damages may not be awarded because to do so "creates the possibility of multiple punitive damages awards for the same conduct." *Id.* at 423.

The decision below, however, reflects a hostility to zealous advocacy that, if left uncorrected, would create powerful and dangerous economic incentives.

First, the court engaged in the very sort of over-deterrence condemned by this Court in *State Farm* by punishing defendant's "dissimilar acts." 538 U.S. at 422. Under *State Farm*, dissimilar conduct—even if unlawful—cannot be the basis of a punitive award. *Id.* at 423 (highlighting danger of "double counting"). Indeed, if dissimilar conduct is punished, the deterrence value of punishing the conduct at issue in the litigation—the conduct found unlawful—will be seriously diluted.

Here, there can be no question that State Farm's litigation strategy in defending against the Campbell's claims had

nothing to do with the underlying conduct at issue in the Campbell's lawsuit. Accordingly, punishing that conduct serves no useful deterrence function and, indeed, dilutes and undermines the deterrence value of punishing the conduct that was in fact at issue in the litigation.

Second, the "conduct" relied upon by the court below to justify an increased penalty manifestly was not unlawful conduct. To the contrary, State Farm was punished for contesting the jury's verdict on appeal and successfully seeking review of the Utah Supreme Court's decision.

As this Court has explained in the context of criminal trials, the very notion of an adversarial system of justice is that "'truth . . . is best discovered by powerful statements on both sides of the question.'" *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) (quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)). Indeed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975); *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness"). This adversarial system is dependent upon zealous counsel promoting the interests of their clients within properly circumscribed ethical and legal limits. *Cronic*, 466 U.S. at 656 n.19. To punish zealous advocacy solely because it is zealous (rather than, say, contumacious) is to undermine that entire system.

Under the decision below, then, defendants in a lawsuit may be deterred from defending themselves zealously for fear that their advocacy will be interpreted as "defiance" that will be used to justify an additional layer of punishment that dwarfs the actual harm allegedly caused by their conduct. Such punishment will not only dilute the law's effort to deter the conduct found unlawful, but will also deter other

conduct—vigorous advocacy—that is highly valued by our society and, indeed, by our Constitution.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Petitioner,

v.

INEZ PREECE CAMPBELL AND MATTHEW C. BARNECK, SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF CURTIS B. CAMPBELL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Utah

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Manufacturers ("NAM") is the nation's largest multi-industry trade association representing large and small manufacturers in every industrial sector and in all 50 States.

Because the NAM's members often are the target of lawsuits seeking millions (or billions) of dollars in punitive damages, the proper application of the excessiveness guidelines that this Court articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and clarified in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2002) ("*State Farm I*"), is of great importance to the NAM and its members. The Utah Supreme Court's decision on remand constitutes as close to outright defiance of this Court's decision in *State Farm I* as it is possible to come without saying it expressly. If allowed to stand, it will surely embolden other courts to ignore the guidance provided in *State Farm I* and to continue to uphold the kind of large, disproportionate punitive awards that have come to plague American manufacturers. Indeed, regrettably, the Utah Supreme Court is far from alone in failing to take seriously the guidance that this Court provided in *State Farm I*. Accordingly, the NAM submits this brief as *amicus curiae* to urge this Court to summarily reverse the Utah Supreme Court's decision and, in so doing, to condemn once and for all the kind of result-oriented evasions of *State Farm I* that are being practiced by the Utah Supreme Court and other lower courts.[1]

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[1] Both parties have filed letters consenting to any and all *amicus* briefs. No counsel for any party to these proceedings authored this brief, in whole or in part. No other entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Outside counsel to *amicus*, Mayer, Brown, Rowe & Maw LLP (then Mayer, Brown & Platt), served as co-counsel for petitioner during the post-verdict proceedings and in the

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court no doubt intended its decision in *State Farm I* to send a strong message to lower courts about the need to enforce the procedural and substantive limitations on punitive damages. The decision is rich with guidance to the lower courts, among the most far-reaching of which is the Court's discussion of the second and third *BMW* guideposts. Unfortunately, many lower courts have effectively disregarded this guidance.

For example, although courts by and large have paid heed to this Court's observation that punitive awards rarely should exceed a single-digit multiple of compensatory damages, few have taken to heart the Court's further pronouncements that the historical tradition of double, treble, and quadruple damages remedies is "instructive" and that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum. The lower courts similarly have invoked a variety of means for avoiding faithful application of the third *BMW* guidepost — notwithstanding this Court's rejection of such evasions in *State Farm I*.[2]

The Utah Supreme Court's decision is perhaps the most striking and prominent — but by no means the only — example of this recurring phenomenon. Accordingly, it is singularly appropriate for this Court to use the present case to

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appeal from the judgment. Mayer, Brown ceased to represent petitioner in this matter in 2001.

[2] Although we focus in this amicus brief on the second and third guideposts, the NAM fully supports State Farm's contention that the Utah Supreme Court's application of the first guidepost is equally indefensible. In particular, by claiming that all five reprehensibility factors identified in *State Farm I* are present in this case, the Utah Supreme Court not only thumbed its nose at this Court's contrary conclusion, but also distorted the reprehensibility criteria to the point where they have lost any usefulness as a constraining force.

provide the additional clarity that the lower courts evidently need.

ARGUMENT

In *State Farm I*, this Court expressed "concerns over the imprecise manner in which punitive damages systems are administered," reiterated its admonition that "punitive damages pose an acute danger of arbitrary deprivation of property," and made clear that reviewing courts must undertake "[e]xacting appellate review" in order to ensure that punitive awards are "based upon an application of law, rather than a decisionmaker's caprice." 538 U.S. at 417-418 (internal quotation marks and alterations omitted). Regrettably, whether out of defiance or confusion, many lower courts have been misapplying (and, in some instances, outright ignoring) the guidance provided in *State Farm I*. Review is necessary to close up the loopholes that the Utah Supreme Court and other lower courts have been opening in disregard of *State Farm I*.

A. Misapplication Of The Ratio Guidepost Is Rampant In The Lower Courts.

In *State Farm I*, this Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages generally "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can

reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Applying these guidelines to the facts of the case, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-420), "a punitive award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

In the aftermath of *State Farm I*, most lower courts have taken to heart the Court's admonition that double-digit (or higher) ratios will rarely be constitutional. At the same time, however, the great majority of courts have either ignored or sought ways to circumvent this Court's statement that the 700-year legislative history of 1:1 to 3:1 ratios is "instructive" and its admonition that, when compensatory damages are substantial, a 1:1 ratio may be the constitutional maximum.

The present case is illustrative. The Utah Supreme Court acknowledged — as it had to — this Court's observation that "this case 'likely would justify a punitive damages award at or near the amount of compensatory damages.'" Pet. App. 5a (quoting *State Farm I*, 538 U.S. at 429). But it proceeded to rationalize away that guidance on the ground that what this Court really meant is that "[t]he 1-to-1 ratio between compensatory and punitive damages is most applicable where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." *Id.* at 15a-16a. "This scenario," the court said, "does not describe this case." *Id.* at 16a. The Utah Supreme Court also rejected this Court's observation that the $1 million award for emotional distress contained a punitive component and therefore militated in favor of a lower punitive/compensatory ratio, stating: "the trial court's compensatory damages award was purged of elements which may have been more properly placed in the category of punitive damages." *Id.* at 15a.

These rationales for deviating from this Court's suggestion that a 1:1 ratio is the likely constitutional maximum not only improperly disregard square holdings of this Court but also are manifestly wrong as a matter of first principles. To begin with, the statement that a 1:1 ratio is reserved for "conduct of unremarkable reprehensibility" (Pet. App. 16a) disregards the fact that, under the law of Utah and every other jurisdiction, conduct of "unremarkable reprehensibility" would not warrant the imposition of *any* punitive damages. It also is impossible to square with this Court's observation that, as a constitutional matter, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is *so reprehensible* as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm I*, 538 U.S. at 419 (emphasis added). Moreover, even if the Utah Supreme Court were right about the 1:1 ratio being limited to cases of "unremarkable reprehensibility," that hardly justifies ignoring this Court's other statements about the historical tradition of 1:1 to 3:1 ratios being "instructive" and a 4:1 ratio being "close to the line" in favor of selecting the highest possible single-digit ratio.

Nor does the Utah Supreme Court's statement that the Campbells' $1 million compensatory award contains no punitive element justify such a dramatic departure from the 1:1 ratio suggested by this Court. Putting aside the impropriety of overriding this Court's express conclusion that the compensatory award did include a punitive element, this rationale for refusing to adhere to the 1:1 ratio (and instead selecting a ratio at the high end of the single-digit range) is fundamentally misguided. Whether or not the $1 million remitted compensatory award was "exclusively for actual harm sustained by the Campbells" as the Utah Supreme Court insisted (Pet. App. 15a), the fact remains that, *from State Farm's perspective*, the entire $1 million is punitive. That is because the most State Farm ever could have hoped to gain from its bad

faith failure to settle within policy limits (and corresponding fraud) was the amount of those policy limits — *i.e.*, $50,000 — a sum far smaller than the amount it ultimately paid after the Utah Supreme Court affirmed the underlying judgment (see 538 U.S. at 413-414). Because the full amount of its potential ill-gotten gain had been removed several times over by its payment of the excess verdict, *every penny of the $1 million compensatory* award served the punitive and deterrent functions of punitive damages. See *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence").[3]

In short, the Utah Supreme Court's rationales for deviating from the 1:1 ratio suggested by this Court are makeweight. Unfortunately, the Utah Supreme Court is far from alone in refusing to adhere to this Court's guidance on ratios.

For example, in another insurance bad faith case, the Ninth Circuit recently took a similarly defiant tack. Straining to uphold a $5 million punitive award that was 2.6 times the $1,920,849 compensatory award for past and future unpaid disability benefits and emotional distress, the court flatly asserted that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004).

That was not the first time that the Ninth Circuit gave short shrift to this Court's discussion of the 1:1 ratio. In its first post-*State Farm I* decision, that court upheld a $2.6 million punitive award that was over seven times the $360,000 compensatory award for economic loss and emotional distress arising out of employment discrimination. *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), cert.

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[3] It bears noting in this regard that the Utah courts awarded the Campbells approximately $1 million in attorneys' fees and costs above their already large compensatory and punitive awards.

denied, 124 S. Ct. 1602 (2004). Focusing solely on this Court's observation that single-digit multiples are more likely to pass constitutional muster than higher ratios, the Ninth Circuit stated: "We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case." 339 F.3d at 1044.[4]

In another employment case, the Eleventh Circuit acknowledged that $500,000 emotional distress awards to each of seven white librarians who allegedly were victimized by reverse discrimination were "substantial," but nonetheless upheld punitive awards against three individual defendants that were between four and five times the compensatory damages allocated to those defendants. *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003), cert. dism'd, 124 S. Ct. 1168 (2004). Without making any inquiry into the extent to which the compensatory awards adequately satisfied the federal interests in deterrence and punishment, the Eleventh Circuit stated that the approximately 4:1 aggregate ratio was within "a range which the Supreme Court has found to be 'instructive,'" and therefore held that the ratio "does not indicate that the punitive damages award violates due process." *Ibid.*

Similarly, in a business tort case, the Federal Circuit held that *State Farm I* did not require it to reduce a $50 million punitive award that was more than three times the compensatory damages. *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003), cert. denied, 124 S. Ct. 1423 (2004). The Federal Circuit's explanation well demonstrates why this Court's further guidance on ratios is

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[4] See also *Greenberg v. Paul Revere Life Ins. Co.*, 2004 WL 74630, at *2 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"), cert. denied, 124 S. Ct. 2918 (2004).

so necessary. Focusing solely on the Court's statements that few ratios exceeding single digits will pass constitutional muster and that a ratio of more than 4:1 may be close to the line — and ignoring entirely the Court's observation that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial (as they undeniably were in *Rhone-Poulenc*) — the Federal Circuit stated:

> In this case, the proportion of punitive damages to compensatory damages does not even approach the possible threshold of constitutional impropriety. The $50 million punitive award is barely above three times the compensatory award of $15 million in this case. That ratio remains within the "[s]ingle-digit multipliers [which] are more likely to comport with due process," not even reaching the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect.

345 F.3d at 1372 (alterations in original; citation omitted).

In short, whether by rewriting this Court's discussion of the ratio guidepost, engaging in a selective reading of it, or straightforwardly denying its significance, many lower courts have effectively read out of the opinion the suggestion that a 1:1 ratio may be the constitutional maximum when compensatory damages are substantial. Indeed, of the 27 post-*State Farm I* decisions released by state and federal appellate courts in which the compensatory award or potential harm has exceeded $200,000 (and thus fairly could be said to be "substantial"), only once has a court construed *State Farm I* to necessitate a reduction to a 1:1 ratio.

In that case, which involved racial harassment in the workplace, the Eighth Circuit held that a $6,063,750 punitive award that was just over ten times the plaintiff's $600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Williams v. ConAgra Poultry Co., 2004 WL 1752583, at *8 (8th Cir. Aug. 6, 2004) (citation omitted).

Aside from *Williams*, we are aware of no case in which an appellate court confronted with a compensatory award of $200,000 or higher has ordered a remittitur to 1:1 or below on federal excessiveness grounds.[5] To the contrary, the overwhelming majority of courts — including other panels of the Eighth Circuit — have treated either 9:1 or 4:1 as a constitutional free pass. See, *e.g.*, *Stogsdill v. Healthmark Partners, L.L.C.*, 2004 WL 1636426, at *5 (8th Cir. July 23, 2004) (observing that "the compensatory damages award is substantial * * * and the punitive damages award is many times [the defendant's] net worth" and then going on to hold that, "[i]n these circumstances, the four-to-one ratio approved by the Supreme Court of Arkansas in *Sauer*, and by the U.S. Supreme Court in *Haslip*, becomes an appropriate due process maximum") (citations omitted); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 73 (Cal. Ct. App.) (stating that, "where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is 'close to the line'"

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[5] We are aware of one published district court case in which the court ordered a $52 million punitive award that was 2.2 times the $23,496,746 compensatory award reduced to $26,125,000. See *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003).

and reducing ratio from 16.7:1 to 6:1 where compensatory damages were $1.5 million), review granted, 88 P.3d 497 (Cal. 2004); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 135 Cal. Rptr. 2d 736, 762 (Cal. Ct. App. 2003) (concluding that *State Farm I*, *BMW*, and *Haslip* suggest that in run-of-the-mill case the outer limit of constitutionally permissible punitive damages is four times compensatory damages, and reducing ratio from 21.3:1 to 3.9:1 where compensatory damages were $258,570); *Williams v. Philip Morris Inc.*, 92 P.3d 126, 145 (Or. Ct. App. 2004) (concluding that, after "potential" harm to non-parties is considered, $79.5 million punitive award, on compensatory damages of $521,000, would "fall within *State Farm*'s 4-to-1 boundary"); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 674-676 (Or. Ct. App.) (focusing exclusively on Court's references to single-digit and 4:1 ratios, stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 215 n.3 (Pa. Super. Ct. 2003) (perfunctorily concluding that 2.7:1 ratio does not violate due process in light of *State Farm I*'s statement on single-digit ratios, where compensatory damages were $300,000), appeal denied, 847 A.2d 1287 (Pa. 2004); *Harris v. Archer*, 134 S.W.2d 411, 438-439, 448 (Tex. Ct. App. 2004, pet. filed) (focusing exclusively on Court's references to single-digit and 4:1 ratios and reducing 7.4:1 ratio to 4:1, despite concluding that "lesser ratio" was warranted, where aggregate compensatory damages were $203,895); *Haggar Clothing Co. v. Hernandez*, 2003 WL 21982181, at *7 (Tex. Ct. App. Aug. 1, 2003, pet. filed) (focusing exclusively on Court's reference to single-digit ratios in upholding 6.7:1 ratio where compensatory damages were $210,000).[6]

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[6] See also, *e.g.*, *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004) (upholding $10 million punitive award on ground that "the ratio of slightly more than 4.5:1 does not offend due process" — even

while acknowledging that "Eden's compensatory damage recovery was significant and that this is a commercial case"); *Union Pac. R.R. Co. v. Barber*, 2004 WL 352525 (Ark. Feb. 26, 2004) (quoting Court's statement about single-digit ratios, but ignoring its statement about a 1:1 ratio possibly being the maximum when compensatory damages are "substantial," in upholding $25 million punitive award that was just under 5 times the $5.1 million compensatory award), cert. pet. filed, No. 04-47 (July 7, 2004); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361, 363 (Ark.) (focusing exclusively on this Court's references to single-digit and 4:1 ratios in approving $21 million punitive award that was 4.2 times the $5 million remitted compensatory award), cert. denied, 124 S. Ct. 535 (2003); *Simon v. San Paolo U.S. Holding Co.*, 7 Cal. Rptr. 3d 367, 391 (Cal. Ct. App. 2003) (upholding punitive award that was 4.3 times non-compensable value of lost "benefit of the bargain" because, "[e]ven if *State Farm* had imposed a 'bright-line' ratio, 4 to 1 would be 'close to the line of constitutional impropriety,' but not presumptively unconstitutional"), review granted, 86 P.3d 881 (Cal. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 812 (Cal. Ct. App. 2003) (deeming a 3:1 ratio to be constitutionally permissible in products-liability case in which surviving family members received almost $4.6 million in compensatory damages); *Maya B. v. Vogel*, 2004 WL 551325, at *13 (Cal. Ct. App. Mar. 22, 2004) (affirming ratio of 2:1 where compensatory damages were $790,000 in sexual assault case on ground that "single-digit multiplier was well within the discretion of the jury and trial court"); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Cos.*, 2003 WL 21224088, at *4 (Cal. Ct. App. May 28, 2003) (unpublished) (reducing 17.1:1 ratio to 3.4:1, where compensatory damages were $293,000, despite concluding that "[t]he facts here are not as bad as they were in *State Farm*"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. Ct. App.) (invoking Court's statement that single-digit multipliers are more likely to comply with due process in upholding aggregate ratio of 3.4:1 where aggregate compensatory damages were $424,000), review denied, 795 N.E.2d 573 (Mass. 2003); *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 422 (Pa. Super. Ct. 2004) (acknowledging that 10:1 ratio exceeded *State Farm I*'s single-digit presumptive ceiling for due process, but concluding that ratio passed constitutional muster in light of defendant's reprehensible conduct (insurance bad faith), its significant wealth, and the "limited" $278,825 compensatory award); *Austin v. Specialty Transp. Servs., Inc.*, 594 S.E.2d 867, 877 (S.C. Ct. App. 2004) (focusing exclusively on Court's references to single-digit and 4:1 ratios in concluding that aggregate ratio of 2.5:1 "comport[ed] with due process" where aggregate compensatory damages were over $1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis.) (implicitly

Because "[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff" (*State Farm I*, 538 U.S. at 425), it is not surprising that lower courts have reached different results in applying the ratio guidepost. But their near universal refusal to heed this Court's guidance regarding the circumstances in which a 1:1 ratio may be the constitutional maximum is much harder to comprehend. Review — and summary reversal — is warranted to make clear to the lower courts that the *entire* ratio discussion in *State Farm I* was meaningful and deserving of fair and honest consideration.

B. The Lower Courts Are Continuing To Either Misapply Or Give Short Shrift To The Third Guidepost.

In *State Farm I*, this Court criticized the Utah Supreme Court for ignoring the directly applicable Utah fine for violations of that State's unfair claims practices statute and instead "speculat[ing] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment * * *." 538 U.S. at 428. In so doing, the Court no doubt intended to lay to rest the kind of result-oriented application of the third guidepost that the Utah Supreme Court had perpetrated in that case. Unfortunately, that objective has not been accomplished. Courts bent on upholding multi-million dollar punitive awards continue to ignore or misapply this guidepost as if *State Farm I* had never been decided.

The decision below is illustrative. Latching on to the fact that this Court appears to have "endorsed a punitive

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concluding that 7:1 ratio of punitive damages to $490,000 in potential harm was not suggestive of an excessive punishment), cert. denied, 124 S. Ct. 925 (2003); cf. *Smith v. Fairfax Realty, Inc.*, 82 P.3d 1064, 1075 (Utah 2003) (deeming federal excessiveness issue waived, but nonetheless upholding $5.5 million punitive award that was 5.5 times the compensatory damages as being "well within the single-digit ratio discussed by the Supreme Court in" *State Farm I*), cert. denied, 124 S. Ct. 1716 (2004).

damages award of $1 million, which is one hundred times greater than the $10,000 fine" established by the Utah legislature for violations of Utah's Unfair Claims Practices Act, the Utah Supreme Court reasoned that a 100:1 ratio "does not offend due process." Pet. App. 17a. It then leaped to the conclusion that a ratio of 902:1 between the punitive damages award and the maximum penalty would likewise comport with due process. *Id.* at 17a, 18a. However, that bit of logical legerdemain not only drains the third guidepost of any constraining force, but also is affirmatively inconsistent with *BMW*, in which the Court concluded that a disparity of 1,000:1 was an indication that the punitive award at issue was grossly excessive. See 517 U.S. at 584.

Regrettably, once again, the Utah Supreme Court is far from alone in attempting to eviscerate the third guidepost as a meaningful constraint. In another insurance bad faith case, the Ninth Circuit used *precisely* the same rationale that this Court rejected in *State Farm I*. Ignoring the fact that the plaintiff's $2.4 million punitive award was 480 times the maximum civil fine for violating Arizona's proscription against unfair claims settlement practices, the court held that the award did not run afoul of the third guidepost because the "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which in this case could be worth hundreds of millions of dollars to Paul Revere." *Greenberg*, 2004 WL 74630, at *2. See also *Myers v. Workmen's Auto Ins. Co.*, 2004 WL 1636753 (Idaho July 23, 2004) (comparing $300,000 punitive award against insurance company for failure to settle plaintiff's accident claim to loss of licensure under the Idaho Trade Practices and Frauds Act).

The Seventh Circuit similarly speculated, in a case involving hotel guests who had been bitten by bedbugs, that the defendant hotel "would prefer to pay the punitive damages assessed in this case than to lose its license" due to "unsanitary conditions," which was theoretically authorized under

municipal safety statutes. *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003).

Other courts have taken the wind out of the third guidepost by comparing the punitive award before them to the hypothetical maximum fine that could be imposed under any circumstance, without considering the character of the specific conduct at issue, actual fining practice, or both. For example, in a case involving a grade-crossing accident allegedly caused by a railroad's failure to remove vegetation that was reducing sight lines, the Arkansas Supreme Court held that a $25 million punitive award passed muster under the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which it determined to be $10,082,500 by adding together the maximum daily state and federal fines for overgrown vegetation ($500 and $20,000 per day, respectively) and treating each day as a separate violation. *Barber*, 2004 WL 352525. That measure of the comparable fine, however, is wildly unrealistic. The *total* amount of fines collected by the Federal Railroad Administration from *all* railroads in America for *all* safety violations (excluding hazardous materials) for the year following the accident was only $4.3 million. See Federal Railroad Administration, Office of Chief Counsel, *Railroad Safety Civil Penalty Cases Closed During Fiscal Year 1999* (Jan. 31, 2000). The penalty that would realistically be imposed for overgrown vegetation at a single crossing was certainly much less, and far from the $25 million that the jury awarded.

Similarly, in holding that a $4.5 *billion* punitive award was constitutionally permissible, a federal district court in Alaska ignored the fact that the actual fines paid by Exxon in connection with the grounding of the *Exxon Valdez* in Prince William Sound were $125 million, on the ground that Exxon *could have been fined* $5.1 *billion* had it been convicted of five criminal offenses and made to pay "twice the gross pecuniary loss" for each of them. *In re Exxon Valdez*, 296

F. Supp. 2d 1071, 1107-1109 (D. Alaska 2004) (internal quotation marks and alterations omitted.

Many other courts have either ignored or refused to give weight to the third guidepost, even when there is a readily available fine with which to compare the punitive award. See, *e.g.*, *Hangarter*, 373 F.3d at 1015 (upholding $5 million punitive award in insurance bad faith case without even acknowledging that fine for violation of California's unfair claim practices statute was $10,000); *Hollock*, 842 A.2d at 422 ($2.8 million punitive award was not "unjustified" in light of "potentially harsh penalties" that could be imposed on insurer for unfair claims handling — $5,000 per-violation fine and suspension of its license); *Trinity Evangelical*, 661 N.W.2d at 803 (refusing to give weight to Wisconsin's $10,000 criminal penalty for unfair insurance claim settlement practices on ground that the Court indicated in *State Farm I* that criminal penalties have "less utility").

Review is badly needed to correct — once and for all — the pervasive refusal among the lower courts to apply the third guidepost in a principled fashion. In too many situations, including the present case, the third guidepost has ceased to perform its function as a constraining force.

CONCLUSION

The petition for a writ of certiorari should be granted, and the Court should summarily reverse the decision below.

Respectfully submitted.

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IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

BRIEF FOR NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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IN THE

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

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v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK, Special Administrator and Personal Representative of the ESTATE OF CURTIS B. CAMPBELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UTAH SUPREME COURT

Amici curiae National Association of Mutual Insurance Companies (NAMIC) and Property Casualty Insurers Association of America (PCIAA) respectfully submit this brief in support of the petition for a writ of certiorari.[1]

INTEREST OF AMICI

NAMIC and PCIAA are two of the leading trade associations of property and casualty insurers. NAMIC represents over 1350 member companies, and PCIAA represents over 1000 member companies, which collectively write every type of property and casualty insurance in every state.

Amici and their members have a substantial interest in seeing that this Court's decision in *State Farm Mutual*

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of amicus briefs have been submitted to the Clerk.

Automobile Insurance Co. v. *Campbell*, 538 U.S. 408 (2003), is respected and its guidance to the lower courts faithfully applied. The proliferation of outsize punitive damages awards has been a problem of special concern to the insurance industry.[2] The Utah Supreme Court's decision on remand from this Court in *State Farm* threatens to exacerbate that problem by disregarding this Court's considered judgment as to the proper measure of punitive damages for State Farm's conduct, and distorting and misapplying the constitutional standards for review of punitive damages awards articulated in *State Farm*. In particular, the Utah court's reasoning raises the specter of excessive and arbitrary punitive damages awards in insurance cases.

INTRODUCTION AND STATEMENT OF THE CASE

"Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting); *see also State Farm*, 538 U.S. at 417; *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994) ("Punitive damages pose an acute danger of arbitrary deprivation of property.").

Prompted by "concerns over the imprecise manner in which punitive damages systems are administered" and the resulting danger of arbitrary awards, this Court originally granted certiorari in this case and set aside the Utah Supreme Court's reinstatement of a $145 million punitive damages judgment against State Farm. *State Farm*, 538 U.S. at 417. The plaintiffs, who had purchased third-party liability insurance from State Farm, had been awarded $1 million in compensatory damages for emotional distress resulting from

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[2] One empirical study of jury verdicts in financial injury cases found that the ratio of punitive to compensatory damages was higher in insurance cases than in any other type of case. *See* Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts* 22-24 & tbl. 3.3 (RAND Institute for Civil Justice 1997).

State Farm's failure to settle a lawsuit against them within policy limits. *See id.* at 412-415.

Applying and elucidating the constitutional standard previously articulated in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), the Court found that this case was "neither close nor difficult" and that the $145 million award was an arbitrary deprivation of property in violation of due process. *State Farm*, 538 U.S. at 418, 429. Based on its own application of the *Gore/State Farm* guideposts to the facts of this case, this Court concluded that those guideposts "likely would justify a punitive damages award at or near the amount of compensatory damages"—that is, approximately $1 million. *Id.* at 429. Accordingly, the Court vacated the Utah Supreme Court's judgment and remanded for further proceedings not inconsistent with its opinion. *See id.*

On remand, the Utah Supreme Court disregarded this Court's guidance. Instead, it determined that a punitive damages award of $9,018,780.75 was warranted—an amount nine times greater than the award this Court had endorsed. App. 1a.[3] To reach this conclusion, the Utah Supreme Court contradicted this Court's specific findings and seriously misapprehended and distorted the constitutional standard set out in *Gore* and *State Farm*. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue, but, even more seriously, undermines *State Farm*'s utility in providing much-needed guidance to the lower courts.

REASONS FOR GRANTING THE WRIT

Amici respectfully submit that this Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Utah Supreme Court, pursuant to Supreme Court Rule 16. In the alternative, the Court should grant plenary review and set the case for briefing and argument. Granting the writ is appropriate here for two reasons.

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[3] The opinion of the Utah Supreme Court is reproduced in the Appendix to the Petition for a Writ of Certiorari, which is cited as "App."

First, the Utah Supreme Court flouted this Court's opinion and mandate, disregarding the Court's carefully reasoned conclusions as to the degree of reprehensibility of State Farm's conduct and the proper proportion between punitive and compensatory damages in this case. Summary reversal is therefore appropriate to correct the Utah Supreme Court's failure to heed this Court's clear direction. *See, e.g.*, *Sumner* v. *Mata*, 455 U.S. 591, 596-597 (1982) (granting certiorari and summarily vacating and remanding where the lower court "apparently misunderstood the terms of our remand" and reached a result inconsistent with the Court's prior opinion); Robert L. Stern et al., *Supreme Court Practice* 322 n.101 (8th ed. 2002) ("Summary reversal may . . . be grounded on the inherent power of the Court . . . to ensure compliance with its own remand orders.").

Second, review is necessary to fulfill the Court's objective in reviewing and reversing the Utah Supreme Court's prior judgment in this case: to alleviate serious "concerns over the imprecise manner in which punitive damages systems are administered" and to provide a specific, reasoned, and consistent standard for lower courts to follow when evaluating punitive damages awards. *State Farm*, 538 U.S. at 417. Because it so drastically misinterprets and misapplies this Court's *State Farm* decision, if allowed to stand, the Utah court's decision threatens to undermine the principles articulated in *State Farm* and to reintroduce into the administration of punitive damages the dangerous arbitrariness that due process precludes. Moreover, the Utah court's rationale is likely to prove particularly pernicious to insurers; if emulated, it could ultimately jeopardize the availability of affordable liability insurance.

I. THE UTAH SUPREME COURT'S AWARD OF PUNITIVE DAMAGES CONTRAVENED THIS COURT'S MANDATE AND THE REQUIREMENTS OF DUE PROCESS.

As this Court explained in *Gore*, and reiterated in *State Farm*, grossly excessive or arbitrary awards of punitive damages violate the Due Process Clause because "[e]lementary notions of fairness . . . dictate that a person

receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574; *accord State Farm*, 538 U.S. at 418.

To ensure that this basic requirement of fair notice has been met, *Gore* and *State Farm* mandate that courts reviewing punitive damages awards "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418; *accord Gore*, 517 U.S. at 575; *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

In *State Farm*, this Court both refined the *Gore* test and applied it to the specific facts of this case, concluding that "a punitive damages award at or near the amount of compensatory damages" was appropriate. *State Farm*, 538 U.S. at 429. On remand, the Utah Supreme Court failed to follow this Court's clear direction and entered an award of punitive damages nine times larger. In doing so, it impermissibly rejected this Court's specific findings, and misapprehended and misapplied each of the three *State Farm* guideposts.

A. The Utah Supreme Court Failed To Respect This Court's Reprehensibility Analysis And Erroneously Held That Breach Of An Insurance Contract Is Equivalent To Physical Injury.

"[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). In order to ensure that the reprehensibility guidepost is susceptible of reasoned and consistent application, this Court in *State Farm* instructed lower courts to consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had fi-

nancial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Id.*; *see also Gore*, 517 U.S. at 576-577. As the Utah court acknowledged, this Court intended these five factors as "measuring tools" to prevent assessments of reprehensibility from reaching "arbitrary, inexplicable, and disproportionate outcome[s]." App. 8a. Together, these factors establish a federal constitutional standard for evaluating a defendant's reprehensibility.

This Court assessed the blameworthiness of State Farm's conduct in light of that standard, and concluded that while "State Farm's handling of the claims against the Campbells merits no praise, . . . a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives." *State Farm*, 517 U.S. at 419-420. The Court ultimately determined punitive damages of approximately $1 million would be appropriate. *See id.* at 429. On remand, the Utah Supreme Court disregarded this Court's considered analysis, finding that, "in light of Utah's values and traditions," State Farm's conduct should be deemed "several degrees more offensive than the Supreme Court's less than condemnatory view that [it] 'merits no praise.'" App. 7a (quoting *State Farm*, 517 U.S. at 419).

The Utah court erred by assuming "Utah's values and traditions" licensed it to reinterpret the federal constitutional standards for measuring reprehensibility set out in *State Farm*.[4] And the court misapplied each of the five indi-

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[4] The Utah court wrongly believed that *State Farm* did not "announce[] a federal standard measuring reprehensibility." App. 6a. It reasoned that "[b]y creating such a national reprehensibility standard, . . . the Supreme Court would have collided with its own rationale for limiting the scope of relevant reprehensibility evidence to intra-state conduct. . . . The Supreme Court respected states' autonomy to make policy choices about the lawfulness of human and corporate behavior within their own borders . . . ." *Id.* That reasoning misses the mark. *Gore* and *State Farm* held that, in imposing punitive damages, a state may as a general rule consider only conduct that occurred in that state. *See State Farm*, 538 U.S. at 421; *Gore*, 517 U.S. at 572-573. That rule derives from the basic constitutional and structural principle that a state has no power to regu-

cia of reprehensibility identified by this Court. In particular, the court ignored this Court's express conclusion that State Farm's actions caused no physical harm and the conduct in question was not repeated—and therefore a high award of punitive damages could not be grounded on either of those factors.[5] In both instances, the Utah court's analysis eviscerates the restraints that this Court identified, and opens the door to the indiscriminate and arbitrary imposition of punitive damages—particularly in insurance disputes.

1. This Court expressly found that the harm to the Campbells "arose from a transaction in the economic realm, not from some physical assault or trauma" and "there were no physical injuries." *State Farm*, 538 U.S. at 426. Moreover, because State Farm paid the excess judgment before the bad faith action was brought, "the Campbells suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *Id.*

Although it claimed to be "mindful" of these conclusions (App. 9a), the Utah Supreme Court disregarded their clear import. It reasoned that policyholders purchase insurance in part to obtain "peace of mind," and failure to pay claims may cause psychological distress. App. 10a (citation and internal quotation marks omitted). It thus concluded that the harm

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late conduct occurring outside its borders. *See State Farm*, 538 U.S. at 421; *Gore*, 517 U.S. at 572-573; *see also, e.g., Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) (noting that a state has no "power or supervision over the internal affairs of another [s]tate"). Needless to say, it does not follow that the federal Constitution imposes no limitations on a state's "autonomy" to decide how to punish conduct occurring within that state. Although states may possess broad discretion with respect to the imposition of punitive damages, that discretion may be exercised only within the substantive boundaries set by the Due Process Clause. *See, e.g., Cooper Indus.*, 532 U.S. at 433; *State Farm*, 538 U.S. at 417. And the standards for measuring reprehensibility set out in *Gore* and *State Farm* recognize that, as a matter of federal constitutional law, "some wrongs are more blameworthy than others." *Gore*, 517 U.S. at 575.

[5] Amici agree with petitioner's discussion of the Utah Supreme Court's treatment of the remaining three factors (*see* Pet. Br. 11-13, 15-16) but believe it is unnecessary to repeat that discussion here.

caused by State Farm—and, indeed, any "misconduct which occurs in the insurance sector of the economic realm"—is "more closely akin to physical assault or trauma than to mere economic loss." App. 10a-11a.

The Utah court's remarkable analysis not only contradicts this Court's express findings, but strips the "physical harm" factor of any usefulness in distinguishing between conduct of greater and lesser culpability. As *Gore* explained, the physical harm factor reflects the basic principle, embodied in tort and criminal law, that "nonviolent [wrongs] are less serious than [wrongs] marked by violence or the threat of violence." *Gore*, 517 U.S. at 577 (quoting *Solem* v. *Helm*, 463 U.S. 277, 292-293 (1983)). Conduct, like State Farm's here, that does not threaten or inflict any physical harm is thus lower on the scale of reprehensibility than conduct that does cause physical injury—as this Court recognized.

The Utah Supreme Court's contrary conclusion is likely to result in particularly harmful consequences to insurers. Under the Utah court's analysis, every breach of an insurance contract is elevated into an injury of the same gravity as physical assault. That reasoning threatens to expose insurers to the prospect of uncontrolled punitive damages awards in cases where failure to settle within policy limits results in claimed emotional distress—even where, as here, there is no physical injury and no significant economic harm.[6] Far from advancing the States' legitimate interest in deterrence, such indiscriminate awards merely create incentives for insurers to settle unmeritorious claims and ultimately make liability insurance more difficult or costly to obtain. *See infra* Part II.

2. The reprehensibility test articulated in *Gore* and *State Farm* recognizes that "repeated misconduct is more reprehensible than an individual instance of malfeasance," and that recidivism can therefore justify a higher award of punitive damages. *Gore*, 517 U.S. at 577; *see State Farm*,

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[6] The Utah court conceded that, because State Farm ultimately paid the entire excess judgment, "the economic harm sustained by the Campbells [was] minimal." App. 9a.

538 U.S. at 419. In its original decision, the Utah Supreme Court found that this factor supported the punitive damages award because, in light of what the Utah court viewed as State Farm's lack of remorse, and the lack of evidence that its policies had changed, "the probability of recurrence of State Farm's misconduct appears extremely high." *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1150 (Utah 2001) (citation omitted).

This Court specifically found that the Utah Supreme Court had erred in finding that State Farm was a recidivist. *State Farm*, 538 U.S. at 423. And the Court admonished that "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the *only* conduct relevant to the reprehensibility analysis." *Id.* at 424 (emphasis added).

This Court thus made perfectly clear that, on these facts, the "repeated misconduct" factor could not justify an award of punitive damages. But the Utah Supreme Court defied that judgment. Although it grudgingly acknowledged that it was "bound by the Supreme Court's finding that State Farm was not a recidivist" (App. 13a), it nevertheless reverted to the very same mistaken rationale it had previously employed, concluding that, based on its putative lack of remorse, State Farm was likely to become a recidivist in the future. State Farm's supposed lack of remorse, in turn, was based on nothing more than its assertion in the litigation of the case against it, and in its brief on appeal, that its actions had not been wrongful. *Id.* The court reasoned that "absence of prior bad acts does not mean that State Farm has forsworn the conduct that caused the Campbells' injury . . . . State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." *Id.*

This analysis not only contradicts this Court's decision, but threatens to eviscerate the "repeated misconduct" factor altogether. If a reviewing court's mere speculation that a defendant might commit bad acts in the future can justify a finding of reprehensibility—in the absence of *any* evidence of repeated wrongful conduct—then such a finding is possi-

ble in nearly every case. The Utah court's distortion of the repeated misconduct factor contravenes this Court's admonition that punitive damages be reserved for the exceptional case where the defendant's conduct "is so reprehensible as to warrant the imposition of further sanctions" beyond compensatory damages. *State Farm*, 538 U.S. at 419.

In *State Farm*, this Court made clear that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423. The Utah court's analysis flouts that instruction and permits punitive damages to be based solely on the court's subjective conclusion that the defendant is the type of "unsavory" business that is likely to commit bad acts in the future—rendering the reprehensibility inquiry susceptible to precisely the kind of arbitrary and discriminatory application this Court has been concerned to avoid. "[T]he point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting); *accord State Farm*, 538 U.S. at 418.

Finally, resting an award of punitive damages on a defendant's refusal to admit wrongdoing in the litigation against it creates significant due process problems in its own right. As this Court admonished in this very case, due process does not permit the assessment of punitive damages against a defendant for lawful conduct. *See id.* at 421; *Gore*, 517 U.S. at 572-573. Nor does it permit a defendant to be punished for exercising its right to defend itself and to appeal from an adverse judgment. *See, e.g., Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"; a person cannot constitutionally be punished for appealing a conviction) (cited in *Gore*, 517 U.S. at 573 n.19). The Utah court's contrary reasoning impermissibly burdens defendants' exercise of their constitutionally protected right to defend against

liability and erroneously expands the boundaries of the reprehensibility analysis far beyond those set by this Court.

B. The Utah Supreme Court Improperly Ignored This Court's Conclusions Regarding The Appropriate Ratio Of Punitive To Compensatory Damages On The Facts Of This Case.

It is well-settled that punitive damages "must bear a 'reasonable relationship' to compensatory damages." *Gore*, 517 U.S. at 580 (citation omitted); *see also TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 459 (1993); *Haslip*, 499 U.S. at 23. In *State Farm*, this Court did more than in any past case to give meaningful guidance to the lower courts on what constitutes a "reasonable relationship" between punitive and compensatory damages. Specifically, the Court made clear that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. Although it noted that greater ratios "may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages,'" *id.* (quoting *Gore*, 517 U.S. at 582), it explained that "[t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *id.*

That scenario, the Court found, precisely captured the facts of this case: "The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation." *Id.* at 426. Moreover, "[t]he compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer, and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element." *Id.* "[I]n light of the substantial compensatory damages awarded (a portion of which contained a punitive element)," the Court concluded that this

case "likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.[7]

The Utah Supreme Court paid no heed to that conclusion. Instead, it distorted this Court's careful articulation of the reasonable relationship inquiry beyond recognition, disregarded this Court's express finding that the compensatory damages award here contained a punitive element, and ultimately adopted a punitive damages award nine times higher than the award this Court had endorsed.[8]

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[7] The Utah court reasoned that it was not bound to follow this Court's conclusions regarding the appropriate measure of punitive damages because "[t]hese are words of prediction, not direction." App. 5a. That reading of this Court's opinion wholly fails to acknowledge that this Court carefully considered the application of the constitutional standards to the facts of this case, and, although it chose not to specify the precise amount of punitive damages that could be awarded, provided clear guidance to the Utah court that an award "at or near the amount of compensatory damages" would be proper. *State Farm*, 538 U.S. at 429.

[8] Since *State Farm*, in cases where compensatory damages were at least $1 million, the nine-to-one ratio approved by the Utah Supreme Court here is the highest ratio of which amici are aware to have been upheld against a federal constitutional challenge. *See Hangarter* v. *Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) ($1,920,849 in compensatory damages and $5 million in punitive damages, for ratio of 2.6:1); *Eden Elec., Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004) ($2.1 million in compensatory damages and $10 million in punitive damages, for ratio of 4.8:1; affirming district court's reduction of punitive damages from $17,875,000 to $10 million in light of *State Farm*); *2660 Woodley Road Joint Venture* v. *ITT Sheraton Corp.*, 369 F.3d 732 (3d Cir. 2004) ($1,350,000 in compensatory damages and $2,025,000 in punitive damages, for ratio of 1.5:1); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366 (Fed. Cir. 2003) ($15 million in compensatory damages and $50 million in punitive damages, for ratio of 3.3:1), *cert. denied*, 124 S. Ct. 1423 (2004); *Bogle* v. *McClure*, 332 F.3d 1347 (11th Cir. 2003) (approximately $3.5 million in aggregate compensatory damages and approximately $13.3 million in aggregate punitive damages, for ratio of 3.8:1); *Interclaim Holdings Ltd.* v. *Ness, Motley, Loadholt, Richardson & Poole*, 298 F. Supp. 2d 746 (N.D. Ill. 2004) ($8.3 million in compensatory damages and $27.7 million in punitive damages, for ratio of 3.3:1); *In re the Exxon Valdez*, 296 F. Supp. 2d 1071 (D. Alaska 2004) ($513,147,740 in compensatory damages and $4.5 billion in punitive damages, for ratio of 8.8:1); *TVT Records* v. *Island Def Jam Music Group*, 279 F. Supp. 2d 413 (S.D.N.Y. 2003) ($23,496,746 in compensatory damages and $29,125,000 in punitive damages, for ratio of 1.2:1; reducing punitive damages from $108 million to

First, the Utah court misstated, and in doing so dramatically narrowed, the circumstances in which this Court explained that a low ratio of punitive to compensatory damages is proper. The court erroneously suggested that the one-to-one ratio endorsed by this Court in this precise case is appropriate only "where a sizeable compensatory damages award for economic injury is coupled with conduct of unremarkable reprehensibility." App. 15a-16a. Because the compensatory damages in this case were for emotional distress, the Utah court reasoned that a one-to-one ratio was insufficient: "We have no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation

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$29,125,000 in light of *State Farm*); *Republic Tobacco, L.P.* v. *North Atlantic Trading Co.*, No. 98 C 4011, 2003 WL 22794561 (N.D. Ill. Nov. 21, 2003) ($3.36 million in compensatory damages and $4.08 million in punitive damages, for ratio of 1.2:1); *Ceimo* v. *General Am. Life Ins. Co.*, No. CV-00-1386-PHX-FJM (D. Ariz. Sept. 17, 2003) ($6,692,610.60 in compensatory damages and $7 million in punitive damages, for ratio of 1:1; reducing punitive damages from $79 million to $7 million in light of *State Farm*); *Union Pac. R.R. Co.* v. *Barber*, No. 03-57, 2004 WL 352525 (Ark. Feb. 26, 2004) ($5.1 million in compensatory damages and $25 million in punitive damages, for ratio of 4.9:1); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346 (Ark.) ($5 million in compensatory damages and $21 million in punitive damages, for ratio of 4.2:1), *cert. denied*, 124 S. Ct. 532 (2004); *Henley* v. *Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App.) ($1.5 million in compensatory damages and $9 million in punitive damages, for ratio of 6:1; reducing punitive damages from $25 million to $9 million in light of *State Farm*), *rev. granted*, 88 P.3d 497 (Cal. 2004); *Romo* v. *Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003) ($4,574,429 in compensatory damages and $23,723,287 in punitive damages, for ratio of 5.2:1; reducing punitive damages from $290 million to $23,723,287 in light of *State Farm*); *Sufix U.S.A. Inc.* v. *Cook*, 128 S.W.3d 838 (Ky. Ct. App. 2004) (approximately $2.8 million in compensatory damages and approximately $3 million in punitive damages, for ratio of 1.1:1); *Honzawa* v. *Honzawa*, 766 N.Y.S.2d 29 (N.Y. App. Div. 2003) ($11 million in compensatory damages and $15 million in punitive damages, for ratio of 1.4:1); *Gallegos* v. *Elite Model Mgmt. Corp.*, No. 120577/00, 2004 WL 51604 (N.Y. Sup. Ct. Jan. 6, 2004) ($1.1 million in compensatory damages and $2.6 million in punitive damages, for ratio of 2.4:1); *Austin* v. *Specialty Transp. Servs., Inc.*, 358 S.C. 298 (S. C. Ct. App. 2004) ($1,025,000 in compensatory damages and $2,600,000 in punitive damages, for ratio of 2.5:1); *Smith* v. *Fairfax Realty, Inc.*, 82 P.3d 1064 (Utah 2003) ($1,007,221 in compensatory damages and $5.5 million in punitive damages, for ratio of 5.5:1), *cert. denied*, 124 S. Ct. 1716 (2004).

is markedly more egregious than conduct which results in $1 million of economic harm." App. 16a.

But the rule articulated by this Court is nowhere limited to cases in which the damages were solely for economic injury. Rather, this Court explained that a low ratio of punitive to compensatory damages is likely to be appropriate in any case where "compensatory damages are substantial." *State Farm*, 538 U.S. at 425. And it expressly concluded that a ratio at or near one-to-one was appropriate *in this case* despite the fact that all the damages were for non-economic injury. Likewise, the Utah court could not justify its disregard of this Court's direction by suggesting that a one-to-one ratio is appropriate only in cases of "unremarkable reprehensibility." This Court itself assessed the reprehensibility of State Farm's conduct, and found a ratio at or near one-to-one warranted.

The limitations the Utah court imposed not only contradict this Court's conclusions regarding the facts of this very case, but fail to take into account the reason that, as this Court stated, substantial compensatory damages generally support a lower ratio of punitive damages. That is so because, in cases where the plaintiff is fully compensated, and compensatory damages are thus a fair measure of the full extent of the harm caused by the defendant's conduct, punitive damages that significantly exceed compensatory damages are not necessary to achieve the goals of punishment and deterrence. *See id.* at 419 (punitive damages are appropriate only where compensatory damages do not adequately punish and deter).

The Utah Supreme Court's misguided rationale thus significantly undermines the purpose of the ratio inquiry—to ensure that punitive damages bear a reasonable relationship to the actual or potential harm caused by the defendant's conduct. *See Gore*, 517 U.S. at 580; *TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. In cases involving damages for non-economic harm, the Utah court's reasoning fails to take an accurate measure of the harm caused, and injects into the ratio inquiry the same subjective considerations that distorted its reprehensibility analysis.

Second, the Utah court's conclusion flies in the face of this Court's determination that a substantial compensatory award solely for emotional distress generally—and in this particular case—supports a lower ratio of punitive damages to compensatory damages. As this Court explained, because damages for emotional distress, like punitive damages, are intended to condemn outrageous conduct, such damages already include a punitive component by definition. *See State Farm*, 538 U.S. at 426, 429; Restatement (Second) of Torts § 908 cmt. c (1977) ("In many cases in which compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."); *cf. also Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) ("Many awards of compensatory damages doubtless contain something of a punitive element . . . ."). Accordingly, in such a situation, punitive damages are likely to be duplicative of the compensatory award, and hence excessive in relation to the legitimate purposes of retribution and deterrence.

Indeed, this Court specifically found such duplication had occurred here, concluding that a portion of the compensatory damages award "contained a punitive element," and that a ratio of punitive to compensatory damages at or near one-to-one was therefore appropriate. *State Farm*, 538 U.S. at 429. The Utah court disregarded that conclusion, asserting that although this Court's concern over duplication was "plausible as an abstract proposition," the compensatory damages here were "purged of elements . . . more properly placed in the category of punitive damages." App. 15a. For the reasons given by petitioner (Br. 27), the Utah court's rejection of this Court's specific finding—which, properly understood, was binding on the lower court—was error.

As discussed above, however, the Utah Supreme Court's error went beyond its disregard of this Court's specific conclusions regarding the facts of this case. The Utah court's failure to heed this Court's guidance regarding the considerations that should govern the ratio inquiry threatens to render that inquiry an empty form, and once again to

permit arbitrary and subjective assessments to prevail over the reasoned standards articulated in *State Farm*. This Court should correct that error.

C. The Utah Supreme Court Failed To Conduct Any Reasoned Analysis Of The Comparable Penalties Guidepost.

The third guidepost by which *Gore* and *State Farm* instruct reviewing courts to examine punitive damages awards is "the disparity between the punitive damages award and the 'civil penalties authorized or imposed in comparable cases.'" *State Farm*, 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). As with the first two guideposts, this Court expressly considered the application of the comparable penalties guidepost to the facts of this case, finding that "[t]he most relevant civil sanction under Utah state law . . . appears to be a $10,000 fine for an act of fraud." *Id.* at 428. Although the Utah Supreme Court accepted this Court's finding, it conducted no reasoned analysis whatsoever of the relationship between that legislatively authorized penalty and the over $9 million award of punitive damages.

Instead, while paying lip service to the comparable penalties inquiry, the Utah court disparaged its usefulness, commenting that "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic." App. 17a. In support of that notion, it noted that "while a $10,000 fine for fraud may appear modest in relationship to a multi-million dollar punitive damages award," that amount is the maximum fine that may be imposed on a person under Utah law for commission of a first-degree felony. *Id.* And it observed that "[t]he Supreme Court endorsed a punitive damages award of $1 million, which is one hundred times greater than the $10,000 fine." *Id.* Based on these two observations, the court concluded that the award of over $9 million was "amply supported by the $10,000 civil penalty." App. 18a.

This approach to the comparable penalties inquiry empties it of any meaningful content. The Utah court's analogy between the $10,000 civil fine that this Court deemed the

appropriate point of reference here and the $10,000 fine that may be imposed under Utah law for a first-degree felony cannot bear scrutiny. A first-degree felony is punishable not only by a $10,000 fine, but also by a prison term, which may in some instances be life. *See* Utah Code Ann. § 76-3-203(1). Accordingly, whether the court meant to suggest that conduct punishable by a $10,000 civil fine is as reprehensible as a first-degree felony, or merely that the amount of the fine is an unreliable guide to the legislature's judgment regarding the seriousness of the conduct at issue, its reasoning is unsound. As this Court expressly found, *see State Farm*, 538 U.S. at 428, the $10,000 civil fine best reflects the "legislative judgment[] concerning appropriate sanctions for the conduct at issue," *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part). The Utah court improperly discounted that legislative judgment. Nor is it clear how this Court's conclusion that an award of $1 million would be appropriate can justify the Utah court's choice of an award nine times higher. Indeed, the opposite is true.

Most fundamentally, the Utah court's reasoning utterly disregards the purpose of the comparable penalties inquiry: to ensure that a defendant in a civil action, consistent with the requisites of due process, has "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574; *accord State Farm*, 538 U.S. at 417. The Utah court did not even attempt to explain how the possibility of a $10,000 fine could put a defendant on notice that its conduct might result in a $9 million punishment.

II. THIS CASE IS OF PARAMOUNT IMPORTANCE TO THE DEVELOPMENT OF REASONED STANDARDS GOVERNING IMPOSITION OF PUNITIVE DAMAGES, PARTICULARLY IN INSURANCE CASES.

This Court was originally led to grant certiorari in this case and to reverse the Utah Supreme Court's judgment by its "concerns over the imprecise manner in which punitive damages systems are administered" and the consequent

danger of unconstitutionally excessive and arbitrary awards of punitive damages. *State Farm*, 538 U.S. at 418. In order to ameliorate that danger, this Court undertook to clarify the constitutional standards governing review of punitive damages. Although the guideposts set out in *State Farm* built on those identified in *Gore*, *State Farm* greatly furthered the development of a rational, consistent jurisprudence of punitive damages by elucidating those guideposts and making them more specific and concrete.

The Utah Supreme Court's decision, if allowed to stand, threatens to undo the work done in *State Farm* to achieve a rational and consistent federal standard for reviewing punitive damages. The Utah court either disregarded this Court's guidance, or applied it in such a way as to render it a nullity. Although it purported to apply the five factors this Court identified as governing the reprehensibility analysis, it believed itself free to reinterpret those factors "in light of Utah's values and traditions." App. 7a. If other courts follow the Utah court's approach, *State Farm* will do little to restrain the imposition of arbitrary and excessive awards, and the "devastating potential for harm" posed by such awards will go unchecked. *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting); *see State Farm*, 538 U.S. at 417.

The Utah court's reasoning poses a particular threat of excessive and harmful punitive damages awards in insurance actions. The Utah court rendered meaningless the distinction drawn by this Court between economic injury and physical harm—and profoundly skewed the calculus of reprehensibility set out by this Court—by theorizing that breaches of an insurance contract that result in emotional distress are "akin to physical assault." App. 10a. It flouted this Court's admonition that a finding of reprehensibility may not be premised on acts dissimilar to the conduct at issue (or on entirely lawful conduct) by speculating that an insurer's refusal to admit bad faith in the litigation against it meant it was likely to be a recidivist in the future. App. 12a-14a. And it failed to heed this Court's clear direction that, in a case like this one, where a plaintiff has received substantial and full compensation for emotional distress stemming from

breach of an insurance contract, punitive damages should be limited to an amount at or near the amount of compensatory damages—instead approving an award nine times greater. App. 14a-16a.

These distortions of the guideposts set out by this Court in *State Farm* open the door to the possibility of grossly excessive, and potentially biased, punitive damages awards in bad-faith suits against insurers. *See, e.g., Oberg*, 512 U.S. at 432 (without clear standards guiding their imposition, punitive damages may be used to "express biases against big businesses, particularly those without strong local presences"); *accord State Farm*, 538 U.S. at 417. Large insurance companies may be particularly vulnerable to anti-big business, and anti-insurer, animus, and the Utah court's analysis does nothing to restrain the expression of such animus through the imposition of excessive punitive damages.

Punitive damages awards exceeding what is necessary for the legitimate purposes of retribution and deterrence can have serious negative social consequences. *See, e.g., Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (noting that the "threat of . . . enormous awards" can deter the development of new and potentially beneficial products); *Gore*, 517 U.S. at 593 (Breyer, J., concurring) (noting that excessive awards can result in overdeterrence of socially useful activity). That is particularly true in the case of insurance bad-faith actions. The threat of a bad-faith suit can potentially be a factor in nearly all litigation against a defendant with liability insurance where there is a possibility of a judgment in excess of policy limits. Indeed, it is routine practice for plaintiffs' attorneys to "'set up' the [defendant's] liability insurer by making a policy limits demand."[9] If the insurer refuses to settle the claim for the limits of the policy, and a judgment is later en-

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[9] John H. Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 Drake L. Rev. 717, 746 (1998); *see also* Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1169 (1980) (explaining that plaintiffs "attempt to 'set up' insurers for excess liability claims under current duty-to-settle law").

tered against the insured in excess of the policy limits, "the insured has a potentially valuable claim against the insurer for violation of the duty to settle. This claim is often assigned to the victorious plaintiff in exchange for a covenant not to execute on the judgment."[10] (Indeed, that is precisely what occurred in this case. *See State Farm*, 538 U.S. at 413-414.) Because the threat of a bad-faith claim is present whenever an insurer considers whether to settle a claim against its insured for the limits of the policy, the risk of excessive punitive damages awards for conduct that a jury finds to be in bad faith is likely to skew insurers' incentives and to lead them to settle nonmeritorious claims.[11] The end result is that liability insurance—a social good—will be more difficult or more costly to obtain.

The "devastating potential for harm" posed by arbitrary and excessive punitive damages awards—ameliorated by the guidance provided in *State Farm*—is revived and exacerbated by the Utah Supreme Court's decision. It is thus critical that this Court correct that decision, not only to ensure compliance with its mandate in this case, but to ensure the continuing vitality of the constitutional standards for review of punitive damages that *State Farm* articulates.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the Utah Supreme Court should be summarily reversed and the case should be remanded with instructions to enter an award of punitive damages at or near the amount of compensatory damages, consistent with this Court's opinion and mandate in *State Farm*. In the alternative, the Court should grant plenary review and set this case for briefing and argument.

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[10] Bauman, *supra* note 9, at 746.

[11] *Cf., e.g., id.* at 747 (discussing possibility that broad availability of emotional distress damages in bad-faith cases could induce insurers to settle invalid claims); *see generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1998) (discussing risk of overdeterrence from excessive punitive damages).

Respectfully submitted,

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No. 04-116

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Petitioner,

v.

INEZ PREECE CAMPBELL and MATTHEW C. BARNECK,
Special Administrator and Personal Representative of the
ESTATE OF CURTIS B. CAMPBELL,
Respondents.

On Petition For A Writ Of Certiorari
To The Utah Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In defiance of this Court's admonition that "application of the *Gore* guideposts to the facts of this case . . . likely would justify a punitive damages award at or near the amount of compensatory damages," 538 U.S. 408, 429, the Utah Supreme Court on remand imposed a punitive damages award that is *nine* times the compensatory damages award, relying in large part on the "lack of remorse" and "callousness" State Farm purportedly displayed in its pleadings.

Amicus will address the following questions:

1. Whether a defendant's nonfrivolous legal arguments and speech contained in pleadings challenging a punitive damages award may serve as the basis for punishment and for justifying the challenged award.

2. Whether the Utah Supreme Court misapplied the ratio guidepost, and violated this Court's mandate, by awarding punitive damages in an amount nine times the substantial $1 million compensatory damages award for emotional distress.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with over 130 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers ~~of pro~~ducts. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

In this brief, PLAC will address an issue of great importance to product manufacturers: the fair administration of punitive civil sanctions. Because plaintiffs routinely seek punitive damages in product liability cases, PLAC's members have a strong interest in ensuring that the constitutional limitations on such awards are strictly enforced, and that punitive damages are not used to punish defendants and their attorneys for vigorously challenging excessive and unconsti-

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

tutional verdicts. Indeed, it is an increasing trend for plaintiffs to argue that a corporate defendant's conduct during the litigation is an appropriate basis for a substantial punitive damages award, and another case presenting this issue is pending before this Court. *See Barber v. Union Pacific R.R. Co.*, ___ S.W.3d ___, 2004 WL 352525 (Ark. Feb. 26, 2004) (imposing punitive damages based on alleged spoliation of evidence, *i.e.*, discovery-related conduct unconnected to the underlying tort), *petition for cert. pending*, No. 04-47 (docketed July 12, 2004).

STATEMENT

In vacating the Utah Supreme Court's original judgment, this Court held that the Utah court erred by "award[ing] punitive damages to punish and deter conduct that bore no relation to the Campbells' harm." 538 U.S. at 422. This Court explained that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* Due Process does not permit courts to punish a defendant "for being an unsavory individual or business," but rather requires that any punishment be strictly related to "the conduct that harmed the plaintiff." *Id.* at 423. For these reasons, the Court explained, "the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist." *Id.*

This Court also found that the Utah court erred in applying the ratio guidepost of *BMW v. Gore*, 517 U.S. 559 (1996), holding that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. It noted that "[t]he compensatory award in this case was substantial" and that the Campbells received "complete compensation" in that they "were awarded $1 million for a year and a half of emotional distress." *Id.* at 426. The Court also held that the award of emotional distress damages counseled in favor of a lower ratio, reasoning that such damages "likely were based on a component which was duplicated in the punitive award." *Id.*

In light of these principles, this Court concluded that "a punitive damages award at or near the amount of compensatory damages" would likely be appropriate. *Id.* at 429.

On remand, the Utah Supreme Court imposed a punitive damages award of approximately $9 million—nine times the amount of compensatory damages. While promising "unwavering fidelity to the letter and spirit of the mandate," the Utah court justified its ruling by characterizing this Court's ruling as offering "words of prediction, not direction." Petitioner's Appendix ("Pet. App.") 2a, 5a. The Utah court based the punitive damages award in large part on its determination that "State Farm has not voiced so much as a whisper of apology or remorse," as evidenced by State Farm's arguments in its appellate briefs and at trial. *Id.* at 12a-13a. The court emphasized its continuing "incredulity" over the fact that "State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case," concluding that "State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence." *Id.* (citation omitted).

Turning to the ratio guidepost, the Utah court deemed this Court's holding "plausible as an abstract proposition," but not binding on remand because it "does not account for the circumstances of the compensatory damages award in this case." Pet. App. 15a. The court then held that the presence of emotional distress damages warranted a *higher* ratio, because "conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *Id.* at 16a. In short, the Utah court concluded, "the trial court's determination that State Farm caused the Campbells $1 million of emotional distress warrants condemnation in the upper single-digit ratio range rather than the 1-to-1 ratio" endorsed by this Court.

SUMMARY OF ARGUMENT

The Utah court expressly punished State Farm for submitting briefs and asserting legal positions that the court

deemed "callous" and demonstrating a "lack of remorse." This conclusion cannot be reconciled with the First Amendment's protection of free speech and the right to petition government, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. The court did not find State Farm's arguments frivolous or made for an improper purpose—nor could it, given that State Farm *prevailed* on many of those arguments before this Court. Indeed, this Court and many others have recognized in a variety of contexts that punitive sanctions are inappropriate when reasonable people could disagree about the propriety of the challenged arguments or conduct. Permitting this $9 million punishment to stand would chill vigorous advocacy and send a warning sign to litigants and their counsel that additional punishment may await those who have the temerity to defend themselves or assert legal positions a court may deem insufficiently remorseful.

The Utah court blatantly defied this Court's mandate concerning the proper application of the ratio guidepost. The Utah court is not alone in this regard: many courts, including courts reconsidering cases in light of *State Farm*, have ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. The ratio requirement is particularly important in product liability cases, where the compensatory damages are often substantial, yet the defendant's level of reprehensibility is low. This Court should grant review to reinforce that a 1:1 limit in such cases is not merely a "prediction," Pet. App. 5a, but a meaningful restriction on punitive damage awards.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM AND CLARIFY THAT PUNITIVE DAMAGES MAY NOT BE BASED ON A DEFENDANT'S LITIGATION POSITIONS AND SPEECH

This Court squarely held that State Farm was not a recidivist, and barred the Utah court from imposing or increasing punitive damages on that basis. 538 U.S. at 423 ("the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist"). On remand, the Utah court seemingly acknowledged that the inquiry must focus on "whether the reprehensible conduct was repeated," and conceded the total "absence of prior bad acts" by State Farm. Pet. App. 12a-13a. But the Utah court then evaded this Court's holding by reasoning that State Farm was likely to commit future misconduct because its litigation positions and pleadings demonstrated "callousness" and a "lack of remorse," and that a severe punitive sanction was therefore warranted. *Id.* at 13a.

The Utah court's reasoning is worse than just illogical: it flouts this Court's mandate in many respects. It *presumes* future recidivism and thus punishes State Farm for imaginary torts that it has never committed; it focuses on conduct that obviously does not "replicate[ ] the prior transgressions"; and it punishes State Farm "for being an unsavory individual or business" rather than for "the conduct that harmed the plaintiff." 538 U.S. at 423. If, as this Court held, it is improper to punish a company for unrelated bad acts that it has already committed, it is even *more* improper to punish a company for bad acts that have not occurred, that may never occur, that may or may not be related to the challenged conduct, and for which the company may have to pay damages if they *do* occur. *See* 538 U.S. at 423 (emphasizing due process dangers of "multiple punitive damages awards for the same conduct").

In addition to these violations of the mandate, the Utah court's opinion cannot be reconciled with numerous deci-

sions of this Court that have emphasized the strong First Amendment protections that attach to speech made in court proceedings, as well as the many decisions recognizing that the constitutional right to petition government encompasses seeking relief through the courts. By punishing State Farm for its in-court speech, and the purported "lack of remorse" displayed in its pleadings, the Utah court violated State Farm's rights under the First Amendment and the Due Process Clause, and established a precedent that, if left standing, will chill vigorous advocacy and expose defendants to multimillion-dollar punishments simply for making arguments that a court deems "callous." Pet. App. 13a.

A. The Decision Below Is Inconsistent With This Court's First Amendment Jurisprudence

This Court has long recognized that the Constitution guarantees the right of access to the court system as well as the right of litigants to defend their case with zeal and vigor. The First Amendment "protects vigorous advocacy," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and restrictions on the types of arguments attorneys may make in court "implicate[ ] central First Amendment concerns." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). The First Amendment's restrictions are made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964); *see also Stromberg v. California*, 283 U.S. 359, 368 (1931) ("It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech.").

An attorney's speech in pleadings and the courtroom is plainly protected under the First Amendment. In *Velazquez*, 531 U.S. 533, a group of attorneys challenged a statutory provision forbidding the Legal Services Corporation from paying attorneys to take cases challenging existing welfare laws. This Court held that the funding restriction violated the First Amendment, explaining that "[t]here can be little doubt

that the [statute] funds constitutionally protected expression," and recognizing that the obvious import of the statute was to skew "the ordinary course of litigation" by providing that certain positions "cannot be expressed" in court. *Id.* at 548. This Court explained that the restriction on attorney speech was "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case" and that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545; *see also Button*, 371 U.S. at 429-31 (Virginia statute barring legal organization from soliciting cases is unconstitutional under First and Fourteenth Amendments).

The First Amendment also guarantees the right "to petition [the Government] for a redress of grievances"—a right that is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). In the *Noerr-Pennington* line of cases, this Court has recognized that the Petition Clause protects conduct and speech before Congress and the courts aimed at redressing grievances and resolving disputes. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), this Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws" and that such an interpretation "would raise important constitutional questions" with regard to the "right of petition." *Id.* at 135, 137-38. The right to petition the legislature recognized in *Noerr* was extended to petitioning the judiciary in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972), where this Court held that "[t]he right of access to the courts is indeed but one aspect of the right to petition." The Court explained that "it would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal

agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests." *Id.*; *see also McDonald v. Smith*, 472 U.S. 479, 484 (1985) ("filing a complaint in court is a form of petitioning activity").

This Court has repeatedly enforced the Petition Clause outside the antitrust context, rejecting attempts to punish companies for taking disputes to court. For example, in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-43 (1983), this Court held that in light of the "right of access to the courts" guaranteed by the First Amendment, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant." Likewise, in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002), this Court held that an employer's lawsuit was protected by the right to petition and could not form the predicate for a government sanction, explaining that "[e]ven unsuccessful but reasonably based suits advance some First Amendment interests." *See also Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring) ("Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means.").[2]

This Court's free speech and right-to-petition decisions reflect the bedrock principle that parties should not be penal-

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[2] In *United States v. Jackson*, 390 U.S. 570 (1968), this Court held unconstitutional a statutory provision allowing for heightened criminal penalties on defendants who exercised their right to a jury trial. The Court held that the "inevitable effect" of the provision was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.* at 581. The Court concluded that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Id.* at 583.

ized for invoking their legal rights and asserting a vigorous defense. "The right to litigate is an important one," *Bill Johnson's*, 461 U.S. at 744, and "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The Utah court in this case, however, expressly punished State Farm for exercising its First Amendment right to litigate and vigorously defend itself by awarding punitive damages for the perceived "callousness" and "lack of remorse" displayed in State Farm's pleadings and litigation positions.

It is plainly improper to punish a litigant for defending the lawfulness of its conduct in court. This principle has particular significance in the context of product liability litigation, where manufacturers are often sued multiple times on the basis of the same alleged defect in their product. In situations where the defendant wins case after case, and then loses in a single instance before a single jury, it is inappropriate to punish that defendant for continuing to defend itself in future actions.

To be sure, a litigant is not absolutely immune from sanction or punishment for in-court speech. A litigant may be sanctioned for filing a frivolous pleading, for example, or for making false or perjurious statements. But the Utah court did not find State Farm's legal positions to have been frivolous or made in bad faith—nor could it have, given that State Farm *prevailed* in its challenge to the punitive damage award. Rather, the Utah court found fault in what it deemed an insufficiently repentant *attitude* manifested in State Farm's briefs. *See, e.g.*, Pet. App. 13a (State Farm "refuses in its brief on appeal to concede any error or impropriety in its handling of the Campbell case") (citation omitted); *id.* ("State Farm's obdurate insistence that its treatment of the Campbells was proper clearly calls out for vigorous deterrence."); *id.* ("State Farm's defiance strongly suggests that it will not hesitate to treat its Utah insureds with the callousness that marked its treatment of the Campbells.").

Moreover, even in the context of sanctions, this Court (and many others) have been sensitive to the First Amendment and due process rights at stake and to the dangers of deterring zealous advocacy by attorneys. In *Cooter & Gell v. Hartmarx Corp.*, for example, this Court recognized that Federal Rule of Civil Procedure 11 "must be read in light of concerns that it will . . . chill vigorous advocacy." 496 U.S. 384, 393 (1990). The Court explained:

> If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged. The knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fees would be likely to chill all but the bravest litigants from taking an appeal.

Id. at 408. The same reasoning applies here: the knowledge that an aggressive defense could ultimately be used as the very basis for *upholding* the punishment would chill vigorous advocacy. *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 68 (1991) (Kennedy, J., dissenting) (a court's "unchecked power" to sanction "can be applied to chill the advocacy of litigants attempting to vindicate . . . important federal rights"); *In re Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986) ("[Z]ealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.") (quotations omitted).

A litigant should not be punished for making arguments that are *reasonable*, even if the court finds the arguments unpersuasive or even erroneous. Many courts have endorsed this principle, holding that when a party's legal position falls within the realm of reasonable argument or debate, sanctions are inappropriate. *See, e.g., Kaplan v. DaimlerChrysler,*

A.G., 331 F.3d 1251, 1255 (11th Cir. 2003) ("[c]ourts assess [Rule 11] sanctions . . . when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument") (quotation omitted); *Gurary v. Winehouse*, 235 F.3d 792, 798 (2d Cir. 2000) (sanctionable conduct occurs "when it is clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands") (quotation omitted); *Metropolitan Life Ins. Co. v. Steffey*, No. 96-2239, 1997 WL 705235, at *1 (6th Cir. Nov. 4, 1997) (reversing sanctions where appellant "made a reasonable argument"). *Cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) ("sham" exception to *Noerr-Pennington* immunity requires that "the lawsuit . . . be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits").

The notion that punitive damages are unwarranted where the propriety of the defendant's conduct is open to reasonable debate, or is the subject of a reasonable disagreement within the public or the relevant industry or community, has a long pedigree. In *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915), this Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief"—*even assuming* that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable."

Similarly, in *BMW v. Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and the Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." *Id.* at 579-80. Nevertheless, the Court recognized that BMW, in attempting to determine what it was required to disclose,

"could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good faith basis for believing that no duty to disclose exists," *id.* at 579-80, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id.* at 578. The Mississippi Supreme Court employed the same reasoning in *Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 234 (Miss. 2001), where it held that punitive damages were unjustified in a bad faith lawsuit against an insurer when the insurer "had an arguable or legitimate basis for denying the claim."

This principle has been repeatedly recognized in product liability cases as well, as courts have held that punitive damages cannot be imposed where "there is a genuine dispute in the scientific community as to" the reasonableness of the design. *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995); *see also Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) (punitive damages inappropriate where "reasonable disagreement" exists over risks and utilities of product). In fact, this proposition is so basic to the law of punitive damages that the Fifth Circuit has held that it is "plain error"—*i.e.*, an error "so fundamental as to result in a miscarriage of justice"—to permit a jury to award punitive damages where the evidence "demonstrated a good faith dispute" as to whether the defendant's conduct was lawful. *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (quotation omitted).

In sum, the conduct for which State Farm was punished—in-court speech by its attorneys—falls squarely within the rights of free speech and petition secured by the First Amendment and the Due Process Clause. Given that State Farm's legal arguments succeeded in persuading this Court that the punitive damage award was excessive and unconstitutional, there can be no doubt that its position was reasonable, even if the Utah court felt that the company could

have been less "callous" in asserting it. Punitive damages simply may not be imposed for such speech and this Court should grant State Farm's petition.

B. The Lower Courts Have Split Over Whether Punitive Damages May Be Based On A Party's Litigation Positions And Speech

The decision below compounds the confusion in the lower courts over the relevance of a defendant's litigation conduct to a punitive damage award. Many lower courts, some even in the wake of *State Farm*, have followed the Utah court's approach and relied on a defendant's litigation positions to justify or increase a punitive sanction. Other courts, in sharp contrast, have recognized that such considerations are irrelevant to a punitive damage award. Guidance from this Court is necessary to dispel the confusion in the lower courts and to reject decisively the Utah court's misguided and unconstitutional approach.

Many courts have properly held—directly in conflict with the Utah court—that a defendant's litigation conduct and speech cannot be used as the basis for a punitive damage award. For example, in *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002), the Fifth Circuit explained that an insurer's "litigation positions and tactics"—even those that are "ultimately unsuccessful"—"do[ ] not constitute the kind of malice, willfully wrongful conduct, gross negligence, or reckless disregard for the insured's rights for which punitive damages are properly imposed." The California Supreme Court has similarly recognized that "the potential 'chilling effect' on appeals . . . would be greatly exacerbated if every appellant faced the prospect that a jury might impose additional damages—compensatory and punitive—in a subsequent action based on its assessment of [the appellant's] motive in prosecuting the appeal." *Coleman v. Gulf Ins. Group*, 718 P.2d 77, 81 (Cal. 1986); *accord De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (Ct. App. 2001) (a defendant's "trial tactics and litigation

conduct may not be used to impose punitive damages in a tort action").

Many courts disagree with this approach, however, and specifically rely on the defendant's litigation conduct in assessing punitive damages, just as the Utah court did here. For example, in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.), a decision that cited repeatedly to *State Farm*, the Seventh Circuit emphasized the defendant's "great stubbornness with which it has defended this case" as a major justification for a large amount of punitive damages. Similarly, in *Miller v. Aaacon Auto Transport, Inc.*, 447 F. Supp. 1201, 1206 (S.D. Fla. 1978), the court explained that the "defendant's tactics in this court of grudging retreat, rock by rock, fence row by fence row" were relevant to (although they did not ultimately warrant) a punitive damages award. *See also Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 419-22 (Pa. Super. Ct. 2004) (affirming punitive damage award largely on the basis of the defendant insurer's conduct during trial of bad faith claim rather than on conduct giving rise to the claim).

In sum, this Court should grant review to eliminate any doubt that the First Amendment and the Due Process Clause bar the imposition of punitive damages on a defendant for doing nothing more than daring to defend itself in a court of law.

II. THE UTAH COURT'S MISAPPLICATION OF THE RATIO GUIDEPOST DEFIES AND UNDERMINES THIS COURT'S RULING

A. The Ratio Requirement Is A Crucial Constitutional Protection

This Court's decision in *State Farm* reflected and enshrined the important constitutional principle that a punitive sanction must bear a reasonable relationship to the actual harm to the plaintiff caused by the defendant. *See* 538 U.S. at 424-28. Importantly, this Court held that in cases where "compensatory damages are substantial, then a lesser ratio,

perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. This Court then made abundantly clear that the case at bar presents this exact situation, noting that "[t]he compensatory award in this case *was* substantial," and that "in light of the substantial compensatory damages awarded (a portion of which contained a punitive element)," the "likely" result on remand should be "a punitive damages award at or near the amount of compensatory damages." *Id.* at 426, 429 (emphasis added).

The Utah court's decision defies this Court's ruling by approving a 9:1 ratio and imposing a $9 million punitive damage award that dwarfs the $1 million this Court indicated was likely the maximum amount permitted under the Constitution. This decision must not be allowed to stand. If the Utah court is allowed to impose a 9:1 ratio in *this* case—where the relevant factors point to a 1:1 ratio, and this Court explicitly instructed the Utah court that 1:1 was the probable outcome—this Court's holding will be severely undermined. This Court should grant certiorari and confirm that *State Farm* means what it says: although a 9:1 ratio may be the presumptive outermost constitutional limit, it is not the norm, and for cases such as this one, a 1:1 ratio (or something very close to it) may not be exceeded.

In many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction. For example, awards of compensatory damages often include a large component of noneconomic damages, such as awards for pain and suffering or emotional distress. As this Court recognized, these types of noneconomic damage awards are very similar to punitive damage awards in that they "contain [a] punitive element," and "'[i]n many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.'" 538 U.S. at 426 (quoting Restatement (Second) of Torts § 908, cmt. c, p. 466 (1977)).

Moreover, noneconomic damages are often plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards. Although this Court emphasized that the presence of noneconomic damages requires a lower ratio, many courts (such as the Utah court, which used the presence of noneconomic damages to *increase* the award, *see* Pet. App. 16a) have misapplied or outright ignored this aspect of *State Farm*. *See, e.g.*, *Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004) (imposing $75,000,000 in compensatory damages, largely for noneconomic harm, and $75,000,000 in punitive damages).

The ratio requirement is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial noneconomic component—so that even a 1:1 ratio can result in a severe sanction. Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. Jurors in such cases are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring). Jurors are not always well suited to make such judgments. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that engage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, *in* Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (conclud-

ing that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). *See also* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976).

The result is that product liability cases pose great danger that juries will "use their verdicts to express biases against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431-32 (1994), even more so than in cases involving economic torts, such as this one. A strong affirmation of the ratio principle will help ensure that this crucial constitutional protection is strictly enforced.

B. Many Lower Courts Are Evading *State Farm*'s Ratio Requirement

This Court's guidance on the proper application of the ratio analysis is urgently needed, as the decision below reflects a growing trend. Many lower courts have essentially disregarded *State Farm*'s holding that a 1:1 ratio is the presumptive limit in cases where compensatory damages are "substantial." As the Ninth Circuit recently declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004). These courts have misinterpreted *State Farm*'s language that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," 538 U.S. at 425, as presumptively authorizing ratios of up to 9:1 in *any* case. For example, one court reasoned that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggested that any lower ratio "presumptively passes muster under the Due Process Clause." *McClain v. Metabolife Int'l,*

Inc., 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003). Another court opined that *State Farm* "guides this court to conclude that . . . a single-digit ratio likely is constitutionally permissible." *Jones v. Rent-a-Center, Inc.*, 281 F. Supp. 2d 1277, 1289 (D. Kan. 2003).

This trend is especially apparent in several recent decisions involving products, a number of which were vacated by this Court and remanded for reconsideration in light of *State Farm*.

For example, in *Williams v. Philip Morris, Inc.*, 92 P.3d 126 (Or. Ct. App. 2004), following a GVR, the Oregon court upheld a 96:1 ratio and imposed a $79 million punitive damage award against Philip Morris. Even though the case was brought by the estate of a single plaintiff, the court upheld the award by theorizing that other individuals not before the court may have been harmed by the defendant's conduct—and that the punishment could be justified by reference to these hypothetical persons and imaginary harms. Thus, the court reasoned, because the defendant "inflicted potential harm on the members of the public in Oregon," a punitive award of $79 million was permissible, even though the plaintiff had been awarded only $820,000 in compensatory damages. *Id.* at 144. Acknowledging that the award vastly "exceed[s] a single-digit ratio," the court opined that "it is difficult to conceive of more reprehensible misconduct" and thus the "unique facts in this case . . . justify more than a single-digit award under the Due Process Clause." *Id.* at 145.

In *Douglas v. DaimlerChrysler Corp.*, No. CV2001-019659 (Ariz. Super. Ct. July 2, 2004), the court affirmed a $50 million punitive damage award against DaimlerChrysler—over 13 times the amount of the substantial $3.75 million compensatory damage award—for a purported design defect in a Dodge Ram pickup truck. Relying on the interpretation offered in a law review article by a plaintiff's attorney rather than this Court's plain language, the Arizona court held that "contrary to reports, [*State Farm*] does not require that punitive damages be no more than nine times greater

than compensatory." *Id.* at 5. Moreover, the court held that for purposes of the ratio analysis, the "denominator"—*i.e.*, the baseline amount of compensatory damages—should include the compensatory damages attributable to a nonparty defendant that was held 50 percent responsible for the harm. *Id.* at 1. In short, the court held that DaimlerChrysler could be punished for harm committed by another party—a result that violates *State Farm* and bedrock principles of due process.

In *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible," *id.* at 576, and imposed a $400,000 sanction. *See also Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. Ct. App. 2003) (approving 7:1 ratio in product liability case on remand following GVR).

Finally, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and even though a significant portion of the compensatory awards reflected noneconomic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," *id.* at 763, let alone by this Court's holding that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

This Court should grant review to confirm that the 1:1 ratio in such cases is not, in the words of the Utah court,

merely an "abstract proposition," Pet. App. 15a, but is rather a meaningful limitation on punitive damage awards.

CONCLUSION

For the foregoing reasons, this Court should grant State Farm's petition and schedule this case for plenary review. In the alternative, the Court should summarily reverse the decision below, as the opinion of the Utah Supreme Court is plainly inconsistent with this Court's mandate.

Respectfully submitted.

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